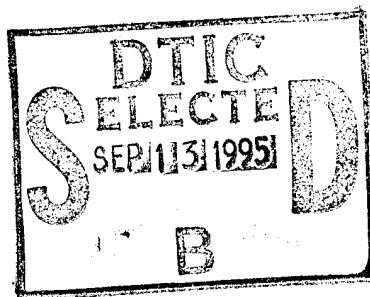


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Government Procurement From Canadian Sources

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Government Procurement from Canadian Sources

Chapter I. Introduction

During the six month period ending December 31, 1994, reports in the Commerce Business Daily (CBD) reflected that the federal government awarded contracts valued at approximately \$100 million to firms located in Canada.¹ The actual dollar value of contracts awarded to Canadian firms, however, was almost certainly higher because not all such awards are required to be synopsisized in the CBD.^{2 3} During the period, the federal government reported purchasing a wide variety of goods and services with the contracts, including railway flat cars for the U.S. Army,⁴ ballistic comparison equipment for the

¹ As compiled from contract awards reported in issues of the Commerce Business Daily (CBD) released from July 1, 1994 through December 31, 1994. Total of reported contract awards to firms with Canadian addresses during the period was \$97,367,750.34.

² Federal Acquisition Regulation (FAR) 5.301; 48 C.F.R. 5.301 (1994), does not require contract awards to be synopsisized in the CBD unless they exceed \$25,000. Regardless of the award value, notice is not required if disclosure would compromise national security; if the award results from acceptance of an unsolicited research proposal that demonstrates a unique and innovative research concept and publication of any notice would disclose the originality of thought or innovativeness of the proposed research or would disclose proprietary information associated with the proposal; if the award results from a proposal submitted under the Small Business Innovation Development Act of 1982; if the contract action is an order placed under a requirements contract; if the award is made for perishable subsistence supplies; or if the award is for utility services, other than telecommunication services, and only one source is available. *Id.*

³ One historical Canadian report estimated that 1987 Canadian defense purchases in the United States totalled \$1.43 billion while Canadian defense sales to the U.S. totalled \$947 million. The same report said that the total two-way trade in defence products between 1959 and 1987 has left the U.S. with a \$2.4 billion trade surplus. (all figures in Canadian dollars.) Madelaine Drohan, *Caught in the Cross-fire*, MACLEAN'S, Mar. 9, 1987, at 15.

⁴ Partial option award for 89 foot and 68 foot railway flat cars. Contract awarded by the U.S. Army Aviation and Troop Command. Contract amount: \$8,913,100. CBD,

Department of the Treasury's Bureau of Alcohol, Tobacco and Firearms,⁵ copper for the United States Mint,⁶ and the growing of containerized seedlings in the Wenatchee National Forest for the Department of Agriculture's Forest Service.⁷ Although most of the major federal agencies reported contracts awarded to Canadian companies,⁸ the majority of the contracts, as might be expected, were from agencies of the Department of Defense.⁹

Although similar in many ways to procurements of like goods and services from

July 8, 1994, Issue No. PSA-1133.

⁵ Contract amount: \$15 million. CBD, September 29, 1994, Issue No. PSA-1191.

⁶ Contract amount: \$1,177,704.00. CBD, November 23, 1994, Issue No. PSA-1228.

⁷ Contract amount: \$83,923.50. CBD, December 23, 1994, Issue No. PSA-1249.

⁸ For example, a \$2,938,451 contract from the Corps of Engineers to design, construct, and deliver a Great Lakes fisheries research vessel (CBD September 26, 1994, Issue No. PSA-1188); a \$116,000 contract from the Department of Justice's Immigration and Naturalization Service to maintain, repair, and rebuild a helicopter (CBD September 2, 1994, Issue No. PSA-1173); a \$152,940 contract from the Federal Aviation Administration for initial and recurrent pilot training (CBD November 3, 1994, Issue No. PSA-1215); a \$160,950 contract from the Centers for Disease Control and Prevention for refurbished gammacell (CBD October 4, 1994, Issue No. PSA-1194); a \$397,750 contract from NASA's Goddard Space Flight Center for an ultra high vacuum system (CBD December 8, 1994, Issue No. PSA-1238); a \$350,400 contract from the Postal Service for a sprocket (CBD November 17, 1994, Issue No. PSA-1224); a \$610,450 contract from the Department of Energy for a mobile transformer (CBD, October 14, 1994, Issue No. PSA-1201); and a \$95,000 contract from the General Services Administration for law enforcement and security equipment (CBD, September 15, 1994, Issue No. PSA-1181).

⁹ 110 of the 126 reported contract awards to firms with Canadian addresses were by Department of Defense agencies.

domestic sources, these procurements are complicated by being subject to international trade agreements, specialized statutes, and particularized FAR and FAR supplement provisions. Although the scope of federal government procurement from Canada is varied, and the dollar value of such procurement is substantial, the published literature devoted to such procurements is limited. This thesis is intended as a foundational-source of information for procurement attorneys having little or no experience with such purchases.

Chapter II provides an introductory historical setting for the relevant international agreements and legislation. Although Canada and the U.S. have enjoyed close and cordial diplomatic relations for many years, international trade policies of the two countries have not always been uniform. These differing trade policies, often seemingly based on domestic political concerns to as large a degree as mutual defense concerns, have, in turn, encouraged and discouraged U.S. government procurement from Canadian sources. For example, procurement from Canadian sources increased substantially during both World Wars I and II but came to a virtual standstill during the intervening years, partially as result of the Great Depression, but also partially as result of U.S. protectionist trade policies. Chapter II focuses on U.S. defense purchases from Canada, although non-defense purchases have also been similarly affected.

Chapter III examines the key U.S. legislation and international agreements which affect procurements from Canadian sources. In most instances contracting officers, and their attorneys, will draw all the guidance needed from the FAR and its supplements. It is important to realize, however, that many of the FAR provisions dealing with procurements

from Canadian sources have been drafted in implementation of the applicable statutes and international agreements. A basic familiarity with the underlying legislation and agreements will aid in understanding the meaning and intent of the provisions. Chapter III begins by examining the Buy American Act (BAA),¹⁰ enacted into law back in 1933 and still affecting a limited number of procurements from Canadian sources. The chapter then moves to a discussion of the major trade agreements affecting procurements from Canadian sources. The 1979 Government Procurement Code,¹¹ agreed to by the U.S. and Canada as part of the GATT's Tokyo Round of Agreements, was the first multilateral agreement covering government procurement. The Government Procurement Code, implemented by the Trade Agreements Act of 1979,¹² is still in effect today, although it will be replaced on January 1, 1996, by the recently concluded GATT Uruguay Round Agreement on Government Procurement.¹³ The government procurement chapter of the

¹⁰ Buy American Act of 1933, ch. 212, tit. III, s 2, 47 Stat. 1520(1933)(current version at 41 U.S.C.A. s. 10a (West Supp. 1995) [hereinafter BAA].

¹¹ GATT Agreement on Government Procurement, opened for signature Apr. 12, 1979, T.I.A.S. No. 10403, 1235 U.N.T.S. 258 (entered into force Jan 1, 1981) [hereinafter Government Procurement Code].

¹² Trade Agreements Act of 1979, Pub.L. No. 96-39, 93 Stat. 144 (1979) (codified as amended at 19 U.S.C.A. ss. 2501-2582)(West Supp. 1995)) [hereinafter TAA].

¹³ GATT Agreement on Government Procurement, Annex to the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations. Done at Marrakesh, April 15, 1994. --- U.S.T.--, T.I.A.S. No. ---, --- U.N.T.S. --- , KAV 4051 (scheduled to enter into force on January 1, 1996) [hereinafter Agreement on Government Procurement]. Note: As of the date of this thesis, permanent numerical citations have not been assigned to this treaty (as well as to several subsequently cited treaties or international agreements), thus lending an appearance that the treaty citation is incomplete.

U.S.-Canada Free Trade Agreement (FTA),¹⁴ agreed to between the two countries in 1988, built on the concepts agreed to in the earlier Government Procurement Code and substantially increased the number of procurement contracts covered by an international agreement. The FTA served as a model for the North American Free Trade Act (NAFTA)¹⁵ and has largely been subsumed into today's NAFTA. NAFTA's government procurement chapter again substantially broadened the scope of procurements covered by international agreement and provided for increased procedural safeguards to ensure openness in the procurement process. The GATT Uruguay Round's Agreement on Government Procurement is the most recent international government procurement agreement entered into by both Canada and the U.S. The Agreement on Government Procurement adopted many of the safeguards included in NAFTA and further expanded the procurements covered by international agreement. Chapter III also examines the important bilateral Letter of Agreement (LOA)¹⁶ between the U.S. Department of Defense (DoD) and the Canadian Commercial Corporation (CCC)(an arm of the Canadian government). The LOA, agreed to back in 1956, still provides a foundation and organizational framework for the majority of DoD contracts with Canadian sources.

¹⁴ U.S.-Canada Free Trade Agreement, exchange of letters signed at Ottawa, Washington and Palm Springs December 22 and 23, 1987. and January 2, 1988; T.I.A.S. No. ---, KAV 270 (entered into force January 1, 1989) [hereinafter FTA].

¹⁵ North American Free Trade Agreement, with notes and annexes. Signed at Washington, Ottawa and Mexico City December 8, 11, 14, and 17, 1992. T.I.A.S. No. --, KAV 3417 (entered into force January 1, 1994) [hereinafter NAFTA].

¹⁶ Letter of Agreement between the Department of Defence Production (Canada) and the U.S. DoD. Maintained by and available through the Foreign Contracting Directorate, Office of the Director of Defense Procurement, DoD [hereinafter LOA].

Chapter III concludes by examining the chief FAR provisions implementing the BAA, the international trade agreements, and the LOA.

Chapter IV collects, categorizes, and considers the reported case law concerning contract formation issues associated with procurements from Canadian sources. Among other topics, the chapter considers responsiveness and responsibility issues as well as protest timeliness and the perennial issue as to who may be considered an interested party for purposes of bid protest jurisdiction.

Chapter V continues to look at the case law, this time however looking at reported cases concerning post-award controversies arising from purchases from Canadian sources. The chapter collects cases under a variety of topics, including currency valuation disputes, use of Canadian inspectors, and tariff and customs issues.

Although most of the reported case law concerns procurements by the federal government, state and local governments are also large potential markets for goods and services from Canada. Chapter VI takes a brief look at the current status of state preference statutes which have traditionally been used by the majority of the states to limit purchases from Canada and other foreign sources. Much of the chapter focuses on Trojan Technologies, Inc. v. Commonwealth of Pennsylvania, 916 F.2d 903 (3d Cir. 1990), cert. denied, 501 U.S. 1212, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991), a recent case upholding a Pennsylvania statute granting a preference for U.S. goods which had been challenged by a Canadian vendor.

Few areas of the law in today's world remain constant for long - the laws and regulations affecting procurements from Canadian sources are no different. Chapter VII

identifies and discusses a number of factors which are likely to result in change in current practices within the next several years. These include economic factors such as the current trade imbalance between Canada and the U.S., domestic Canadian political pressures such as a need to reduce defense spending, and changes and proposed changes in U.S. procurement law.

Chapter VIII concludes the body of the thesis by reviewing and summarizing the government procurement coverage of the important NAFTA trade agreement, the two GATT government procurement trade agreements, and the Buy American Act.

Although this thesis focuses on U.S. government procurements from Canadian sources, the appendix provides a glimpse into the corresponding procurement system of the Canadian government and its openness to procuring goods and services from U.S. providers. The Canadian government prospectively provides a large, relatively-close additional market for U.S. government contractors. Recent changes in Canadian procurement practice, including the use of a computer-driven electronic bidding system, should increase such opportunities for U.S. contractors.

Chapter II. History

Many of the agreements, statutes, and regulations affecting procurement from Canadian sources have been made in the context of political decisions. Although obtaining the best good at the lowest price, regardless of the good's source, may be an important and laudable U.S. procurement goal, it has often not been the only goal.¹⁷ Trade matters between Canada and the U.S. have often been touchy - at least partly because the countries are each other's largest trading partners¹⁸ and changes in trade policy may have a direct substantial effect on each nation's economy. A brief historical overview of the trade relationship through the years, focusing on defense-related commerce, will prove helpful in understanding why certain statutes were passed and why certain agreements and practices came into being.

A. Pre-Civil War Up To World War I - A Rocky Start To Encouraging Trade By Reducing Tariffs

In 1854, the United States and Canada¹⁹ entered into a free trade treaty, known as

¹⁷ For example, on January 20, 1995, the Office of Federal Procurement Policy announced core guiding principles for federal procurements which state that the vision for the federal acquisition system is to deliver on a timely basis the best value product or service to the (government) customer, while maintaining the public's trust and fulfilling public policy objectives. (underscoring added) 63 Fed. Cont. Rep. (BNA) 87 (Jan. 23, 1995).

¹⁸ Every year Canada sells about 75% of its exports to the U.S., and buys about 70% of its imports from the U.S. America's trade with Canada is, in dollar value, almost twice its trade with Japan, which is the second largest trading partner for both the U.S. and Canada. WAYNE C. THOMPSON, CANADA 1993, 117 (1993).

¹⁹ Although the treaty concerned itself with tariffs between the U.S. and Canada, the treaty was actually entered into between the United States and Great Britain since Canada was not yet an independent country.

the Elgin-Marcy treaty,²⁰ covering a limited number of primary products of the two countries such as fish, lumber, grain, and coal. This was the first trade agreement between the two countries addressing tariff rates on substantial numbers of items. The treaty resulted in duty free status for about 55% of U.S. exports to Canada and for about 90% of Canadian exports to the U.S.²¹ The treaty did not cover manufactured goods from either country. In 1859 Canada passed a law imposing tariffs on certain manufactured goods from the U.S. to protect its industry.²² During the early years (1861-1862) of the Civil War, both the U.S. and Confederate governments procured large amounts of military goods for the war effort from Europe, often bidding against each other for the same goods and, thereby, increasing prices.²³ The procurements focused on armaments, which were in relatively short supply in the U.S., rather than blankets or uniforms which could be procured readily from within the U.S.²⁴ Although the procurements were necessary to quickly supply the rapid increase in the numbers of the armed forces, Congress grew increasingly concerned that U.S. industry was being bypassed and was not reaping any

²⁰ Treaty Regarding the North Atlantic Fisheries, Commercial Reciprocity with British North American Colonies, and Navigation of the St. Lawrence River, Lake Michigan, and Other Waters. Signed at Washington June 5, 1854. Treaty Series No. 124, 6 Miller 667 (entered into force September 11, 1854).

²¹ ALAN M. RUGMAN, MULTINATIONALS AND CANADA-U.S. FREE TRADE, 16 app. (1990).

²² *Id.*

²³ JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 187,188 (1992)

²⁴ *Id.*

rewards from the procurements.²⁵ By 1862, this protectionist attitude resulted in the near cessation of any procurements for the military from outside the U.S.²⁶ Although Canada had not been a substantial supplier of defense goods to the federal government during the Civil War, the protectionist attitude towards U.S. industry which Congress had developed during the war years, coupled with Canada's 1859 imposition of tariffs on U.S. manufactured goods, resulted in Congress allowing the 1854 trade agreement to expire in 1866.²⁷ In 1867, 1869, and 1874 Canada sought new treaties allowing duty free access of its natural resource products into the U.S. in return for duty free access of designated U.S. manufactured goods to Canada.²⁸ In each instance the U.S. was not interested. Canada responded by building a protectionist wall of high tariff barriers which discouraged trade between the two nations.²⁹ There were additional unsuccessful attempts to reduce the

²⁵ *Id.*

²⁶ *Id.* at 189. In January 1862, shortly after becoming secretary of war, Edwin Stanton forbade further contracts for any article of foreign manufacture that could be made in the United States, and revoked all outstanding contracts in foreign countries. All foreign procurement virtually ended by 1863. *Id.*

²⁷ The treaty was terminated on March 17, 1866. The strains placed on the friendly relations between the U.S. and Great Britain by the Civil War also contributed to the expiration of the treaty. For commercial reasons the British Government had sympathized with the Southern States during the war. It had granted them the rights of a belligerent, had allowed them to use British ports, and had connived in the practice of blockade running. The resulting feeling of resentment in the U.S. ran high. EMORY R. JOHNSON ET AL., HISTORY OF DOMESTIC AND FOREIGN COMMERCE OF THE UNITED STATES, VOL. II., 61 (1915)

²⁸ RUGMAN, *supra* note 21, at 17.

²⁹ In 1879 Canadian Conservative party leader Sir John A. Macdonald introduced his National Policy with the end of building a unified Canada, choosing as its means protection of Canadian manufacturers behind tariffs which gradually increased to an

tariff barriers during the waning years of the 19th century. For example, in the 1890s the U.S. suggested the possibility of a joint customs union which would employ a common tariff schedule to be used by both countries in their relations with the remainder of the world - but this failed when Canada was unwilling to amend its favorable tariff schedules in favor of Britain and its colonies.³⁰ In 1911 Canada and the U.S. successfully negotiated a far ranging tariff reduction agreement designed to provide for reciprocal trade in some goods and identically reduce tariffs on other goods.³¹ The agreement was estimated to permit 50 percent of Canadian imports from the U.S. and 80 percent of U.S. imports from Canada to enter duty free.³² After the agreement was approved by Congress (with some difficulty), it was disapproved by the Canadian government and never came into force. A Canadian election had taken place between the time the agreement was negotiated and the time it was submitted for approval. Canada's Conservative party prevailed in the election on a slogan of "No Trade Nor Truck With The Yankees," and defeated Canadian ratification of the agreement.³³

B. World War I Up To World War II - War Year Purchases Followed By The

average of 30 percent by 1890. Although the import substitution was viewed partly as a bargaining device to be used in negotiating trade concessions from the U.S., in practice the protection that it established became deeply embedded. D.L. MCLACHLAN, CANADA-US FREE TRADE, 5 (1987)

³⁰ RUGMAN, *supra* note 21.

³¹ *Id.* at 18.

³² *Id.*

³³ *Id.*

Great Depression And Protectionism

Canadian exports to the U.S. increased dramatically after the U.S. entered World War I. For example, in 1914 customs records show that the U.S. imported explosives valued at \$256 thousand from around the world with \$188 thousand of the total coming from Canada.³⁴ This annual total increased to \$7,860,000 by 1918 with all but \$2,000 coming from Canada.³⁵ Similarly, in 1914 the U.S. imported \$2,000 of goods from Canada for "the construction and equipment of vessels." This increased to \$2,080,000 during 1918.³⁶ Following the war, however, a resurgence in protectionist attitudes towards trade within both countries led to increased tariff rates with each country responding in-kind to the other's tariff increases.³⁷ Notwithstanding the high tariffs, however, the U.S. and Canadian economies were becoming steadily more integrated. By 1926, 79 percent of all direct foreign investment in Canada was from the U.S.³⁸ By 1933, shortly after Franklin Roosevelt was first elected President, this figure had grown to 82 percent.³⁹

Although U.S. investment in Canada was growing, trade between the two countries decreased after the 1930 U.S. Hawley-Smoot⁴⁰ tariff law came into effect. This

³⁴ UNITED STATES TARIFF COMMISSION, THE EUROPEAN WAR AND UNITED STATES IMPORTS, Table 5, page C-22 (1939) [hereinafter UNITED STATES TARIFF COMMISSION].

³⁵ *Id.*

³⁶ *Id.* at Table 5, page C-48.

³⁷ RUGMAN, *supra* note 21, at 20.

³⁸ *Id.* at 19.

³⁹ *Id.*

⁴⁰ Tariff Act of 1930, as amended, 19 U.S.C.A. 1466. (West 1995 Supp.).

protectionist U.S. tariff law significantly increased tariff rates and, coupled with effects of the Great Depression, resulted in a nearly 60% fall in Canadian exports to the U.S. from 1931 until 1933.⁴¹

Bilateral trade was further discouraged when Congress passed the Buy American Act (BAA) in 1933⁴² to encourage the federal government to limit its procurements to goods manufactured in the U.S. The BAA was signed into law by President Hoover on March 3, 1933, his last day in office.⁴³ President Roosevelt, President Hoover's successor in office, however, was a believer in encouraging less restrictive trade between Canada and the U.S. In 1935, his support resulted in the Canada-U.S. Bilateral Agreement.⁴⁴ This was the first comprehensive trade agreement between the two countries since 1854 and rolled back tariffs on some goods. The agreement was further expanded in 1938 to cover more goods.⁴⁵

⁴¹ Exports from Canada to the U.S. in 1931 were \$349,660,000 (Canadian dollars). Exports had fallen to \$143,160,000 (Canadian dollars) by 1933. O. MARY HILL, CANADA'S SALESMAN TO THE WORLD, THE DEPARTMENT OF TRADE AND COMMERCE, 1892-1939 562 (1977).

⁴² BAA, *supra* note 10.

⁴³ Morris D. Davis, *The Domestic Components Requirement of the Buy American Act: Dismayed in America?* 36 A.F. L. REV. 129,130 (1992)

⁴⁴ 49 Stat. 3960; E.A.S. 91; 6 Bevans 75.

⁴⁵ 53 Stat. 2348; E.A.S. 149; 6 Bevans 117. By 1938, however, the annual value of imports from Canada had still not reached the 1918 level. U.S. customs records show \$434 million of total imports into the U.S. from Canada in 1918 compared with an annual average of \$345 million from 1936-1938. UNITED STATES TARIFF COMMISSION, *supra* note 34, at table 1, page A-3.

C. World War II - Years Of Cooperation Based On Mutual Need

The requirements of the Second World War dramatically increased the need for defense procurements between the two countries. On August 18, 1940, President Roosevelt and Canadian Prime Minister King agreed to establish a Permanent Joint Board on Defense.⁴⁶ The Joint Board was to "commence immediate studies relating to sea, land, and air problems including personnel and materiel."⁴⁷ On April 20, 1941, President Roosevelt and Canadian Prime Minister King agreed, in what came to be known as the Hyde Park Agreement,⁴⁸ "as a general principle that in mobilizing the resources of this continent each country should provide the other with the defense articles which it is best able to produce, and above all, produce quickly, and that production programs should be coordinated to this end."⁴⁹ Canada agreed to attempt to provide the U.S. between \$200 million and \$300 million of "munitions, strategic materials, aluminum, and ships" within the next 12 months.⁵⁰ During the whole of the war years, the U.S. bought approximately \$1.25 billion in war materiel from Canada under the Hyde Park Agreement.⁵¹ Canada

⁴⁶ DEPT ST. BULL., August 24, 1940, at 154; 6 Bevens 189. Agreement to continue the Joint Board after the conclusion of WWII was announced on February 12, 1947. DEPT ST. BULL., February 23, 1947, at 361; 6 Bevens 430.

⁴⁷ *Id.*

⁴⁸ DEPT. ST. BULL., April 26, 1941, at 494; 6 Bevens 216.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ National Security Council Report, NSC 5822/1, Dec. 30 1958, *in* U.S. DEPT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, VOL VII PART I, WESTERN EUROPEAN INTEGRATION AND SECURITY; CANADA, 735 (Glenn W. LaFantasie, ed. 1993) [hereinafter NSC Report].

purchased about the same from U.S. sources.⁵² The war years also witnessed a number of diplomatic notes between Canada and the U.S. covering other defense issues with procurement overtones such as the construction of the Alaskan highway⁵³ and the establishment of U.S. bases on Canadian soil.⁵⁴ As the war started drawing to a close, and shortly after its conclusion, diplomatic notes were exchanged regarding the disposal of war surplus property.⁵⁵

D. Post World War II Through The 1960s - DEW Line And The Realities Of Differences In Economic Strength

The years 1947 and 1948 saw secret negotiations between the two countries concerning possible mutual tariff reductions.⁵⁶ Although the probability of agreement looked likely, Canadian Prime Minister King called off the discussions in 1948 for

⁵² *Id.*

⁵³ Agreement Providing For The Construction Of A Military Highway To Alaska. Exchange of Notes at Ottawa March 17 and 18, 1942; entered into force March 18, 1942. 56 Stat. 1458; E.A.S. 246; 6 Bevans 261; 101 U.N.T.S. 205.

⁵⁴ Arrangement Relating To Naval And Air Bases. Exchange of Notes at Washington September 2, 1940; entered into force September 2, 1940. 55 Stat. 2405; E.A.S. 181; 12 Bevans 551; 203 L.N.T.S. 201.

⁵⁵ Agreement Relating To A Final Settlement For All War Surplus Property Disposed Of Pursuant To The Agreements Effected By Exchanges Of Notes Of November 22 and December 20, 1944; March 30, 1946; and July 11 and 15, 1946. Exchange of Notes at Ottawa June 17 and 18, 1949; entered into force June 18, 1949. 2 U.S.T. 2272; T.I.A.S. 2352; 200 U.N.T.S. 258.

⁵⁶ McLACHLAN, *supra* note 29, at 7.

domestic political reasons.⁵⁷

After the initial euphoria following the conclusion of the Second World War, it became obvious fairly quickly that both Canada and the U.S. must consider the possibility of military threat to the North American continent from the Soviet Union via an incursion across Alaska or Canada's northern borders. In 1950, by exchange of diplomatic notes, Canada and the U.S. entered into a agreement to coordinate the economic efforts of the two countries for the common defense.⁵⁸ The agreement specifically "looked back"⁵⁹ to the Hyde Park agreement and determined a set of principles for the purpose of facilitating interests of mutual security and assisting each government to meet its NATO commitments:

1. In order to achieve an optimum production of goods essential for the common defense, the two countries shall develop a coordinated program of requirements, production, and procurement.
2. To this end, the two countries shall, as it becomes necessary, institute coordinated controls over the distribution of scarce raw materials and supplies.
3. Such United States and Canadian emergency controls shall be mutually consistent in their objectives, and shall be so designed and administered as to achieve comparable effects in each country. To the extent possible, there shall be consultation to this end prior to the institution of any system of controls in either

⁵⁷ Prime Minister King's diary reveals his particular concerns with regard to (a) the short time frame within which critical decisions would have to be taken; (b) the consequent difficulty, notwithstanding the necessity, of preparing the country and thereby obtaining broad national cohesion on a potentially divisive issue that could easily be represented as economic, cultural, and political absorption of Canada by the U.S.; and (c) consideration of party advantage. MCLACHLAN, *Supra* note 29, at 7.

⁵⁸ Agreement Relating To Economic Cooperation For Defense. Exchange of Notes at Washington October 26, 1950; entered into force October 26, 1950. 1 U.S.T. 716; T.I.A.S. 2136; 132 U.N.T.S. 247.

⁵⁹ *Id.*

country which affects the other.

4. In order to facilitate essential production, the technical knowledge and productive skills involved in such production within both countries shall, where feasible, be freely exchanged.

5. Barriers which impede the flow between Canada and the United States of goods essential for the common defense effort should be removed as far as possible.

6. The two governments, through their appropriate agencies, will consult concerning any financial or foreign exchange problems which may arise as a result of the implementation of this agreement.⁶⁰

In 1950, finding its continued applicability "inconsistent with the public interest," the Secretary of the Air Force granted a general waiver to the Buy American Act with regard to procurements from Canada.⁶¹ The other two services followed suit, although they granted waivers on specific items rather than a general waiver of applicability.⁶²

During the early 1950's, agreement was reached whereby jointly-financed and operated radar warning sites were built and established across Canada's Arctic region. The first system, referred to as the Pinetree system, was constructed north of the most thickly settled areas of Canada. It was built and operated partly by Canada and partly by the U.S., with the latter taking the larger share. During the Korean conflict when U.S. electronic production facilities were operating near capacity, the U.S. made heavy purchases from Canada of radar and other electronic equipment connected with air

⁶⁰ *Id.*

⁶¹ Paper prepared in the Department of Defense, March 5, 1959, *in* U.S. DEPT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, VOL VII PART I, WESTERN EUROPEAN INTEGRATION AND SECURITY; CANADA, (Glenn W. LaFantasie, ed. 1993) 752 [hereinafter DoD Paper].

⁶² *Id.*

defense, particularly in connection with the Pinetree system.⁶³ By the end of 1954 all the heavy radar stations in the Pinetree-system were installed and operating. Following agreement between the two countries in 1955,⁶⁴ the U.S.-financed Distant Early Warning (DEW) Line was constructed across the Canadian Arctic. The DEW Line was largely completed and in operation by 1957. Under the DEW line agreement, "equal consideration" was given to the contractors of both Canada and the U.S. in the selection of construction contractors for joint or U.S. defense installations in Canada.⁶⁵ In practice, Canadian firms received the significantly larger share of the construction contracts, based in large part on their natural advantages of site proximity and knowledge of local conditions.⁶⁶ For example, of \$202 million of construction contracts awarded by the U.S. between 1955 and 1958 in connection with the DEW Line, Mid-Canada Gap Filler, and Pinetree Augmentation Agreement projects, all but \$14 million went to Canadian firms.⁶⁷ Between 1951 and 1958, the U.S. made about \$775 million in defense purchases in

⁶³ *Id.* at 747. Under the terms of the bilateral agreements covering the Pinetree installations, the U.S. agreed "when practicable" to purchase in Canada equipment to be installed in Canada. "Practicability," over time, was found to have been met if determinations were made that Canadian technical competence on a given item was satisfactory and the ability to produce at a reasonable cost and within the time required was demonstrated. *Id.*

⁶⁴ Establishment in Canada of Warning and Control System Against Air Attack. Effected by Exchange of Notes at Washington, May 5, 1955; entered into force May 5, 1955. 6 U.S.T. 763, T.I.A.S. 3218, 241 U.N.T.S. 179.

⁶⁵ NSC Report, *supra* note 51, at 733.

⁶⁶ *Id.*

⁶⁷ *Id.* at 734.

Canada, much of it in connection with the radar warning systems; Canada purchased about \$825 million from the U.S. during the same period.⁶⁸

As the radar warning system projects were finished however, the dollar value of U.S. government procurements from Canada decreased substantially. While the U.S. purchased \$270 million of goods from Canada in 1953 alone,⁶⁹ annual purchases decreased to less than \$50 million per year between 1954 and 1959.⁷⁰ These figures are somewhat misleading however as to the total scope of U.S. defense-related purchases from Canada because they do not include subcontracts awarded to Canadian contractors by U.S. prime contractors. For example, Western Electric, a major DEW Line prime contractor, awarded \$230 million in subcontracts to Canadian companies between 1955 and 1959, an amount greater than the direct procurement from Canada by the three Armed Services during the same period.⁷¹

In 1956, Canada, acting through its Canadian Commercial Corporation (CCC) and the United States, through the Department of Defense (DoD) entered into a Letter of Agreement (LOA) establishing guidelines for defense procurement between the two countries.⁷² The CCC is a Canadian Crown Corporation (owned and controlled by the

⁶⁸ *Id.* at 736.

⁶⁹ *Id.* at 738.

⁷⁰ DoD Paper, *supra* note 61, at 749.

⁷¹ *Id.*

⁷² LOA, *supra* note 16.

Government of Canada)⁷³ with responsibility for encouraging and facilitating sales of Canadian goods to foreign buyers.⁷⁴ With only limited exceptions, the LOA, still in effect today, required that all DoD procurements from Canadian sources be accomplished through the CCC.⁷⁵

While the U.S. was making defense purchases from Canada, Canada was doing the same from the U.S. as well. Throughout the 1950's the U.S. and Canadian Armed Forces had been discussing and taking steps to equip themselves with common weapon systems and supplies. This was an outgrowth of the geographical proximity of the two countries, the presence of the U.S. Armed Forces at the northern Canadian radar warning sites, the two countries' membership in NATO, and their undertaking to each provide troops for service in the Korean Conflict. Perhaps inevitably, this move towards common weapon systems tended to be a move by the Canadian Armed Forces towards U.S. weapon systems rather than the other way. The single best example came in early 1959. In February 1959 the Canadian Government cancelled its contracts and plans to further develop and produce the CF-105 Arrow aircraft, choosing, rather, to employ U.S.-produced weapons systems in its place.⁷⁶ The CF-105 was a Canadian-designed interceptor aircraft which Canada had intended its Armed Forces to use. Canada also had

⁷³ Canadian Commercial Corporation Act, R.S.C. 1989 c. C-6 (Can.).

⁷⁴ See text beginning at page 56 for more information about the Canadian Commercial Corporation.

⁷⁵ Specifics of the LOA are discussed *infra* beginning at page 55.

⁷⁶ DoD Paper, *supra* note 61, at 750.

hopes of recouping some of its development and production costs by exporting the aircraft to the Armed Forces of other countries, including the U.S. Once the U.S. decided not to use the aircraft, even for purposes of patrolling the skies above Canada,⁷⁷ the Canadian Government decided it could no longer afford to continue final development and production costs. By the time the program was cancelled, the Canadian government had reportedly invested, over a number of years, as much as \$300 million in development costs, a significant sum when compared with its estimated annual defence budget of \$1 billion.⁷⁸ Within Canada, the absence of the CF-105 aircraft was partially filled by purchases of U.S. Bomarc surface-to-air missiles.⁷⁹ The Air Force resisted Canadian government calls for advance assurances that contracts equating to a certain percentage of the costs of the missiles would be awarded to Canadian firms.⁸⁰ Recognizing problems, many of which may still be inherent in the contracting relationship today, the Air Force noted the following as potential roadblocks to a U.S. contracting officer awarding a contract for technically sophisticated Bomarc missile components to a Canadian firm: security clearances, release of classified information, licensing agreements, lack of confidence in the knowledge of Canadian capability, qualification problems, inadequate

⁷⁷ Memorandum from the Officer in Charge of Canadian Affairs (Byrns) to the Director of the Office of British Commonwealth and Northern European Affairs (Parsons), August 7, 1958, in U.S. DEPT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1958-1960, VOL VII PART I, WESTERN EUROPEAN INTEGRATION AND SECURITY; CANADA, (Glenn W. LaFantasie, ed. 1993) 722.

⁷⁸ DoD Paper, *supra* note 61, at 750.

⁷⁹ *Id.*

⁸⁰ *Id.* at 751.

liaison with United States' laboratories, and lack of aggressiveness and frustration on the part of Canadian industry.⁸¹

E. 1970s To Present - Era Of International Trade Agreements

Differences about trade between themselves aside, both Canada and the U.S. had been early leaders in the post-WWII movement to lower tariffs worldwide. Both countries were signatories to and participants in the discussions leading to the original General Agreement on Tariffs and Trade (GATT).⁸² By the 1970's the GATT negotiations and agreements were credited with bringing tariff rates to their then lowest worldwide rates in modern history. Emphasis in the Tokyo round of GATT negotiations, which began in 1973, expanded from just attempting to continue to lower tariff rates to a concern about other impediments to free trade between nations. In 1978, after extensive negotiations, 12 GATT member nations participating in the Tokyo round of negotiations, including both the U.S. and Canada, agreed to a Government Procurement Code.⁸³ The Government Procurement Code was the first multilateral, international agreement on government purchases.⁸⁴ The Government Procurement Code was designed to reduce

⁸¹ *Id.*

⁸² Opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

⁸³ GOVERNMENT PROCUREMENT CODE, *supra*, note 11. The 12 countries were Austria, Canada, European Community, Israel, Finland, Hong Kong, Japan, Norway, Singapore, Sweden, Switzerland, and the United States.

⁸⁴ THE GATT URUGUAY ROUND, A NEGOTIATING HISTORY (1986-1992), VOL. I: COMMENTARY, at 1028 (Terence P. Stewart, ed. 1993) [hereinafter GATT NEGOTIATING HISTORY].

non-tariff barriers to trade raised by individual nations which had the effect of restricting government procurement contracts to companies or products from the procuring country.

Although the Government Procurement Code was a major step in further opening Canadian and U.S. procurements to each others companies and products (and those of other Government Procurement Code signatories as well), the Government Procurement Code only applied to purchases from certain governmental agencies and above certain dollar minimums. At the time it agreed to the Government Procurement Code, the United States estimated that it would provide U.S. companies with access to some \$20 billion of previously-closed government procurements among the signatory countries while opening approximately \$12.5 billion of the U.S. federal government procurement market to signatory nations.⁸⁵ These optimistic estimates were not borne out, however, largely because the Government Procurement Code did not cover the purchases of services and, with respect to supplies, permitted the exclusion of substantial amounts of defense, telecommunications, heavy electrical, and transportation equipment.⁸⁶

The possibility of a U.S.-Canadian customs union or U.S.-Canada Free Trade Agreement (FTA) had been discussed as early as the late 19th century but, as noted earlier, had never come to fruition. On September 26, 1985, Canadian Prime Minister Mulroney formally proposed that negotiations begin between the two countries to

⁸⁵ TWENTY-FOURTH ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, 1979 43(1979)

⁸⁶ GATT NEGOTIATING HISTORY, *supra* note 83, at 1033. In fact, in 1990, it was estimated that the Government Procurement Code had only opened up the following percentages of total government procurement in selected signatories: United States (10-15%), Norway (3%), Switzerland (33%), Sweden (15%), and Canada (<5%). *Id.* at n.88.

establish a free trade area.⁸⁷ After agreement was reached and approved by the legislatures of both Canada⁸⁸ and the U.S., the FTA became effective on January 1, 1989. Under the FTA, Canada and the U.S. agreed to phase out tariffs on imports/exports of all goods of the two countries by 1998. The FTA also included its own government procurement chapter which went beyond the provisions of the Government Procurement

⁸⁷ ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, TWENTY-NINTH ISSUE 1988 23(1988) [hereinafter 1988 TRADE AGREEMENTS REPORT]. The following extract, written by a Canadian commentator in 1987 after negotiations had begun but before they had been finalized, describes some of the considerations influencing Canada's interest in a bilateral trade agreement with the U.S.:

The large and growing extent of discriminatory trading blocks has left Canada as one of the few major industrial countries without free access to a market of over 100 million people. . . . The power of the EEC, the US, and Japan has effectively resulted in trilateral negotiations whose results may or may not take account of Canadian interests as an essentially minor player. Given the size of the US trade deficit and the strength of protectionist feeling in Congress, where numerous individual protectionist bills, and also an omnibus trade bill, are at various stages in the legislative pipeline, the question of security of access to the US market has now become perhaps the single most important one for Canadian trade policy. Attempts to diversify Canadian trade to involve other partners to a greater extent have proved largely unsuccessful. The entire EEC is now of less importance to Canada than the UK alone was a generation ago.... Like other countries Canada has experienced problems in penetrating the Japanese market for manufactures. And exports to developing countries offer rather limited prospects....

MCLACHLAN, *supra* note 29, at 11,12.

⁸⁸ The Canadian FTA Act was passed only after the conclusion of the Canadian federal election of November 1988. The election was fought almost entirely on the issue of whether Canada should ratify the FTA, with Prime Minister Mulroney's Progressive Conservative Party advocating ratification and the Liberal Party and the New Democratic Party advocating non-ratification. The Progressive Conservatives prevailed in the election winning 170 seats to the Liberal's 82 and the New Democratic's 43. Charles W. Levesque, Comment, *Chapter 13 of the United States-Canada Free Trade Agreement: Has it Created an Open and Effective Government Procurement Dispute Resolution System?* 12 NW. J. INT'L L. & BUS. 187, n.2 (1991).

Code by significantly lowering the dollar threshold for affected procurements and mandating an increased procedural "transparency" for those procurements covered. In 1988 it was estimated that, compared with the Government Procurement Code, the FTA's reduced general threshold of \$25,000 for supply contracts would result in an additional \$3 billion in annual U.S. government procurements and \$500 million in annual Canadian government procurements being covered between the two countries by a procurement trade agreement.⁸⁹

The North American Free Trade Agreement (NAFTA), fostering free trade between Canada, the U.S., and Mexico, followed fairly closely on the heels of the FTA and became effective on January 1, 1994. Its government procurement chapter made only modest changes to the procedural safeguards in the FTA's government procurement chapter but increased the scope of covered procurements. Significantly, NAFTA included coverage of some government procurement service and construction contracts for the first time.

The Uruguay Round of GATT negotiations was finalized in late 1993. Its Agreement on Government Procurement is scheduled to come into effect on January 1, 1996 and is the most recent multilateral international agreement significantly affecting government procurement between Canada and the U.S. As with the GATT Tokyo Round's Government Procurement Code, the Uruguay Round's Agreement on Government Procurement continued its focus on non-tariff barriers to trade in the

⁸⁹ BUREAU OF NATIONAL AFFAIRS, INC., U.S.-CANADA FREE TRADE AGREEMENT: THE COMPLETE RESOURCE GUIDE, VOL. II, A LEGAL GUIDE E-50 (1988).

government procurement area while still pursuing its traditional role of negotiating reductions in tariff levels. The Agreement on Government Procurement followed NAFTA's lead in including coverage of some service contracts and incorporated many of the procedural safeguards included in the earlier NAFTA and FTA. Although the Agreement on Government Procurement made a start towards also covering state/provincial-level government procurements, the U.S. excepted such procurements from the scope of the Agreement with respect to Canada.

Chapter III. Key Legislation and International Agreements

A. The Buy American Act

The Buy American Act (BAA) was passed in 1933 during the depths of America's Great Depression to establish a preference for domestic end products in procurements by the federal government.⁹⁰ With only limited exceptions, the BAA restricted the acquisition of goods for public use by the federal government to those manufactured or produced in the U.S.⁹¹ The BAA still impacts federal government procurements from Canada although the impact has decreased over the years due to amendments to the statute and administrative determinations that Canada comes within certain statutory exceptions.

The BAA was created as a "device to foster and protect American industry, American workers and American invested capital."⁹² The legislative history states that the law is "primarily . . . an employment measure conceived in the notion that American tax money should maintain American labor in a moment of crisis and exigency."⁹³ Senator Arthur Vandenberg, an original Buy American Act sponsor, further explained:

[I]t occurs to me that in a time like this, when we are beset upon all sides with an almost inescapable and unavoidable responsibility to provide

⁹⁰ See Linda Louise Watkins, *Effects of the Buy American Act on Federal Procurement*, 31 FED. B.J. 191 (1972) (asserting that reasons for enacting BAA were to stimulate economy and increase employment).

⁹¹ 41 U.S.C.A. s. 10a. (West Supp. 1995).

⁹² See *Allis-Chalmers Corp, Hydroturbine Division v. Friedkin*, 635 F.2d 248 (3rd Cir. 1980).

⁹³ 76 CONG. REC. 3,254 (1933).

employment for unemployed American people, we have a right to draw the line . . . in defense of American industry and American employment, when we are spending American tax funds.⁹⁴

The statute reflected congressional concerns that Americans be put back to work on government works projects during the Great Depression. The BAA is also viewed as retaliation against "Buy British" requirements in effect during the 1920-1933 period.⁹⁵ The then impending construction of the Hoover Dam, however, was also a major reason the BAA passed when it did.⁹⁶ The project required the government to procure a variety of heavy equipment over a period of several years. A bid opening for a contract to supply some of the equipment was scheduled for February 3, 1933, and several foreign firms were hopeful of award.⁹⁷ After U.S. firms complained, notice was given on February 2, 1933, that bid opening was to be delayed; the BAA was introduced to Congress at the same time and quickly passed.⁹⁸ The bid opening was conducted on March 10, 1933, after passage of the BAA, and a domestic firm was awarded the contract.⁹⁹ The foreign firms had withdrawn their bids in the meantime.¹⁰⁰

The core of the BAA is the requirement that any goods acquired for public use be

⁹⁴ *Id.*

⁹⁵ WILLIAM H. LASH III, BYE-BYE BUY AMERICAN ACT, CENTER FOR STUDY OF AMERICAN BUSINESS, 2 (1994).

⁹⁶ Davis, *supra* note 43, at 130.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

mined or produced in the United States. The BAA states:

[O]nly such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use.¹⁰¹

Today, the BAA only applies to a limited range of purchases from Canada. The BAA focuses on the procurement of supplies and does not restrict the purchase of services. With the exception of construction contractors, the BAA does not require that service contractors limit themselves to using goods produced or manufactured in the U.S.¹⁰² The BAA does not restrict the purchase of articles, materials, or supplies for use outside of the U.S.,¹⁰³ nor does it apply to goods which are not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality.¹⁰⁴ The Federal Acquisition Streamlining Act (FASA) placed a floor on the BAA by making it inapplicable to goods procured under any contract awarded in an amount less than or equal to the micro-purchase threshold.¹⁰⁵ The current micro-purchase threshold is \$2,500.¹⁰⁶ Statutes implementing the FTA¹⁰⁷ and NAFTA¹⁰⁸

¹⁰¹ 41 U.S.C.A. s 10a (West Supp. 1995)

¹⁰² 41 U.S.C.A. s 10b (West Supp. 1995)

¹⁰³ 41 U.S.C.A. s 10a (West Supp. 1995)

¹⁰⁴ *Id.*

¹⁰⁵ Federal Acquisition Streamlining Act of 1994, Pub.L. No. 103-355 s 4301, 108 Stat. 3243, 3347 (codified at 41 U.S.C.A. s 10a (West Supp. 1995)).

¹⁰⁶ *Id.*

effectively set an upper floor on applicability of the BAA by requiring agencies to disregard BAA restrictions when evaluating Canadian end products¹⁰⁹ under supply contracts with an estimated value above \$25,000. NAFTA, as implemented, also waived application of the BAA with respect to goods procured as part of construction contracts covered by NAFTA, i.e., most government construction projects of \$6.5 million or more.¹¹⁰

The BAA permits federal agencies to waive its provisions if application of the BAA would be "inconsistent with the public interest"¹¹¹ or result in an "unreasonable"

¹⁰⁷ United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub.L. 100-449, Sept. 28, 1988, 102 Stat. 1851, as amended by Pub.L. 101-207, s 1(b), Dec. 7, 1989, 103 Stat. 1833; Pub.L. 101-382, Title I, ss 103(b), 134(b), 135(c), Aug. 20 1990, 104 Stat. 635, 651, 652; and Pub.L. 103-182, Title I, s 107, Title III, s 308, Title IV, s 413, Dec. 8, 1993, 107 Stat. 2065, 2104, 2147 [hereinafter FTA Implementation Act].

¹⁰⁸ North American Free Trade Agreement Implementation Act, Pub.L. 103-182, Dec. 8, 1993, 107 Stat. 2057 [hereinafter NAFTA Implementation Act]. Procedurally, the NAFTA Implementation Act gave the President authority to waive the BAA for those contracts covered by NAFTA. President Clinton acted upon this authority to waive the BAA for the covered procurements in Proclamation No. 6441, 58 Fed. Reg. 66,867 (1993).

¹⁰⁹ A "Canadian end product" is defined by the FAR as "an article that (a) is wholly the growth, product, or manufacture of Canada, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term includes services (except transportation services) incidental to its supply; provided that the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such." FAR 25.401; 48 C.F.R. 25.401 (1994).

¹¹⁰ NAFTA, *supra*, note 15, at Article 1001(1)(c). Construction services for designated government enterprises are only covered to the extent they are valued at \$8 million or more. *Id.*

cost.¹¹² As interpreted by the Department of Defense FAR Supplement, purchase of a domestic good is not consistent with the public interest "where the purposes of the [BAA] are not served."¹¹³

As a general rule, on other than DoD procurements, the cost of a U.S. good is deemed unreasonable if it exceeds a foreign bid by more than 6 percent including customs duties, or 10 percent excluding customs duties and specific costs.¹¹⁴ However, if the government is procuring items from small businesses or firms located in labor-surplus areas, as specified by the U.S. Department of Labor, costs are not considered unreasonable unless they exceed a foreign bid by 12 percent or more.¹¹⁵ The rules for purchases by the DoD specify that the price of a domestic end product is unreasonable if it exceeds a foreign product covered by the BAA after a 50 percent differential (including duty) is added.¹¹⁶ As discussed below, the Trade Agreements Act, implementing the Government Procurement Code, permits, but does not require, the President to waive the

¹¹¹ 41 U.S.C.A. s 10a (West Supp. 1995).

¹¹² *Id.*

¹¹³ DFARS 225.102(B); 48 C.F.R. 225.102(B)(1994). This DFARS provision also provides two examples of procurement situations in which accepting a domestic offer does not serve the purposes of the BAA: 1) where accepting the low domestic offer will involve substantial foreign expenditures; or (2) where accepting the low foreign offer will involve substantial domestic expenditures.

¹¹⁴ Exec. Order No. 10582, section 2(b), Dec. 17, 1954, 19 Fed.Reg. 8723 (1954), as amended by Exec. Ord. No. 11051, Sept. 27, 1962, 27 Fed.Reg. 9683 (1963); Exec. Order No. 12148, July, 20, 1979, 44 Fed.Reg. 43239 (1979); Exec. Order No. 12608, Sept. 9, 1987, 52 Fed.Reg. 34617 (1987).

¹¹⁵ FAR 25.105(a)(2); 48 C.F.R. 25.105(a)(2) (1994).

¹¹⁶ DFARS 225.105(1); 48 C.F.R. 225.105(1) (1994).

BAA in its entirety for signatory countries to the GATT Tokyo Round's Government Procurement Code who are in "good standing."¹¹⁷

The primary focus under the BAA is the location of the manufacturing or mining process and not the nationality or geographical location of the contractor providing the supplies. Today, the BAA primarily affects procurements from Canada in which the goods to be supplied are assembled or manufactured in Canada from parts or components obtained outside of Canada or the U.S. U.S.-based contractors offering to furnish goods obtained in Canada may be affected by the BAA as well as Canadian-based contractors offering to furnish goods obtained in Canada. Under the BAA, goods are considered to be foreign goods "if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials."¹¹⁸

Manufactured goods must meet a double test to avoid being classified as foreign goods. They must (1) be manufactured in the U.S. and (2) the cost of the foreign articles, supplies, or materials used in the manufacturing must not exceed the 50 percent cost test.¹¹⁹ If the product is manufactured domestically and at least 50 percent of the cost of the product can be attributed to domestic components, the goods will be deemed "domestic end products."¹²⁰

¹¹⁷ See discussion below beginning at page 35.

¹¹⁸ Exec. Order No. 10582, *Supra*. note 113, at sec. 2(a).

¹¹⁹ 41 U.S.C.A. s 10a (West Supp. 1995).

¹²⁰ 19 Fed. Reg. 8723, amended by Exec. Order No. 11051, September 27, 1962, 27 Fed. Reg. 9683 (1962); and FAR 25.101 (48 C.F.R. 25.101(1994)), DFARS 225.000-70 (48 C.F.R. 225.000-70).

B. Government Procurement Code

The Government Procurement Code was the first international agreement of its type establishing minimal procedural requirements for government purchases.¹²¹ It was intended to ensure that signatory governments do not discriminate among foreign suppliers and do not discriminate against foreign suppliers in favor of domestic suppliers.¹²² Consensus on the Government Procurement Code was reached in 1978 and it took effect on January 1, 1981.¹²³ The Trade Agreements Act of 1979¹²⁴ was passed by Congress to implement the GATT Tokyo Round's Government Procurement Code.

The Government Procurement Code is comprehensive in its scope and covers the procurement process from the point at which notices of intended procurements are released¹²⁵ until notice of contract award is publicized.¹²⁶ The drafters attempted to mandate a "transparent procurement process" so that all bidders, both potential and actual, can reasonably assess the government's needs and reasonably understand the applicable procurement procedures.¹²⁷ Specific requirements are directed, such as publication of

¹²¹ Michael T. Janik, *A U.S. Perspective on the GATT Agreement on Government Procurement*, 20 GEO. WASH. J. INT'L. L. & ECON. 491 (1987).

¹²² GATT NEGOTIATING HISTORY, *supra* note 84, at 1031.

¹²³ *Id.*

¹²⁴ TAA, *supra* note 12.

¹²⁵ Government Procurement Code, *supra* note 11, at Art. V, para. 4.

¹²⁶ *Id.* at Art. VI, para. 1.

¹²⁷ *Id.* at preamble.

notices of proposed purchases,¹²⁸ a minimal period of at least 40 days from publication of the notice until the deadline for receipt of offers,¹²⁹ and the opening of offers "under procedures and conditions guaranteeing the regularity of the openings."¹³⁰ The Government Procurement Code makes no provision for private contractor enforcement of its requirements nor does it require signatories to maintain an open or accessible bid challenge mechanism.

A contract is only covered by the Government Procurement Code if it meets each of the following criteria: (1) the contract must be primarily a supply contract and not a service contract;¹³¹ (2) the contract value must exceed a specified threshold value, expressed as an amount equivalent to 130,000 "drawing rights";¹³² (3) the contract must

¹²⁸ *Id.* at Art. V, para. 4.

¹²⁹ *Id.* at Art. V, para. 11. See further discussion of this "40-day" requirement beginning at page 64.

¹³⁰ *Id.* at Art. V, para. 15(d).

¹³¹ *Id.* at Art. I, para. 1. Construction contracts are not included within the Code's coverage; some construction contracts are included under the subsequent NAFTA and Agreement on Government Procurement. See sections D and E of this chapter.

¹³² *Id.* at Art. I, para. 1, as amended by Protocol Amending the Agreement on Government Procurement, opened for signature Feb. 2, 1987, --- U.S.T. ---, T.I.A.S. No. ---, --- U.N.T.S. ---, KAV 2408 (entered into force Feb. 14, 1988). The Special Drawing Right (SDR) is an international reserve asset that serves as the International Monetary Fund's official unit of account. Pursuant to Executive Order 12,260, the U.S. Trade Representative periodically determines the dollar value of the SDR. Exec. Order No. 12,260, 3 C.F.R. 311 (1981), reprinted in 19 U.S.C.A. s 2511 (West Supp. 1995). The most recent determination equated SDR 130,000 with \$176,000. Notice of Valuation of Special Drawing Rights, 56 Fed. Reg. 66117 (1991).

be awarded by a government agency not exempted from the agreement;¹³³ and (4) the contract must not otherwise be subject to an exception under the agreement.¹³⁴

The primary impact of U.S. implementation of the Government Procurement Code has been to waive the requirements of the Buy American Act for those foreign companies whose governments are entitled to the benefits of the Code.¹³⁵ The TAA, implementing the Government Procurement Code, permits the President to waive provisions of the BAA with respect to procurements of "eligible products"¹³⁶ from signatory countries of the Government Procurement Code.¹³⁷ The United States Trade Representative, acting on delegation of authority from the President, has determined that Canada is a signatory to the Government Procurement Code.¹³⁸ An amendment to the

¹³³ Government Procurement Code, *supra* note 11, at Art. I, para. c. The U.S. included most agencies of the Executive Branch under the agreement. A list is at Code Annex I. The most notable exceptions are all procurements by the Departments of Energy and Transportation and many procurements by the DoD.

¹³⁴ *Id.* at Art. VIII, para. 1 (exemption for procurements "indispensable for national security or for national defense purposes") and Art. VIII, para. 2 (exemption of procurements based on social policies such as procurements relating to public health and safety, intellectual property, or prison labor).

¹³⁵ Janik, *supra* note 121.

¹³⁶ The term "eligible product" is defined at 19 U.S.C.A. s 2518(4) (West Supp. 1995). The rule of origin included in the definition states that "An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed."

¹³⁷ 19 U.S.C.A. s 2511 (West Supp. 1995)

¹³⁸ 46 Fed. Reg. 1657 (1981).

BAA, however, prohibits procurement of any article, material, or supply mined, produced, or manufactured in a signatory country which is considered not to be in good standing with respect to certain requirements set out in the TAA.¹³⁹ Canada has not been found to be other than in "good standing."

The TAA has stirred controversy among commentators¹⁴⁰ and U.S. companies by significantly amending the rule of origin used to define foreign goods eligible for waiver from the BAA.¹⁴¹ As stated above, under the BAA to be properly classified as a domestic

¹³⁹ 41 U.S.C.A. s. 10b-1(a)(West Supp. 1995). Lack of "good standing" is to be determined in accordance with procedures established by the TAA at 19 U.S.C.A. s 2515 (West Supp. 1995). Under the TAA, the President is required to provide an annual report to Congress (1) identifying each country which is a signatory to the Government Procurement Code and is not in compliance with its requirements, (2) identifying each signatory country in compliance with the requirements of the Government Procurement Code but which, in the government procurement of products or services not covered by the Government Procurement Code, maintains a significant and persistent pattern or practice of discrimination against U.S. products or services resulting in identifiable harm to U.S. businesses and whose products or services are acquired in significant amounts by the U.S. Government, and (3) identifying each non-signatory country which maintains, in government procurement, a significant and persistent pattern or practice of discrimination against U.S. products or services which results in identifiable harm to U.S. businesses and whose products are acquired in significant amounts by the U.S. Government. 19 U.S.C.A. s 2515(d)(2) (West Supp. 1995). If subsequent negotiations or dispute resolution proceedings between the U.S. and the offending country do not resolve the problems, the U.S. may designate the country as not in "good standing." 19 U.S.C. s 2515(f)(3) (West Supp. 1995).

¹⁴⁰ Charles F. Szurgot, Comment, *The Buy American Act: Reverse Discrimination Against Domestic Manufacturers; Implications of the Trade Agreements Act of 1979 on the Rule of Origin Test*, 7 ADMIN. L.J. AM. U. 737 (1994).

¹⁴¹ The legislative history indicates that Congress sought to conform the TAA's rule of origin test with current customs laws which used the substantial transformation test to determine the duty of imported products. See S.REP. NO. 249, 96th Cong., 1st Sess. 140 (1979) (stating that United States will use the rule of origin test used by Customs to make determinations under the TAA). This also conforms to the language used in the Government Procurement Code, which states in part: "the parties shall not

manufactured good, a good must be manufactured in the U.S. from materials at least 50 percent of which are also of U.S. origin. Under the TAA, "eligible products" from signatory nations to the Government Procurement Code may consist in whole or in part of materials from a third country so long as the materials making up the final product are "substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed."¹⁴² Differences in interpretation have developed between the General Services Administration and the Department of Defense as to whether "eligible products" may include goods from all signatory nations to the Government Procurement Code, including the U.S., or only to signatory nations other than the U.S.¹⁴³ GSA has adopted the broader, more inclusive definition, while DoD has chosen to limit the definition of "eligible products" to goods from Government Procurement Code signatories other than the U.S.¹⁴⁴ Commentators suggest that DoD's interpretation discourages contractors from manufacturing supplies in the U.S. because "substantial transformation" of a foreign good (for example, a good from a non-signatory country to the Government Procurement Code such as India) in the U.S. may not be used to meet the BAA's U.S.-origin

apply rules of origin to products imported for purposes of government procurement ... [that] are different from the rules of origin applied in the normal course of trade." Government Procurement Code, *supra* note 11, at Art. II, para. 3.

¹⁴² 19 U.S.C.A. s 2518(4)(B) (West Supp. 1995).

¹⁴³ *ABA Recommends Buy American Rule Adopt Substantial Transformation Test*, 12 Int'l Trade Rep. (BNA) 297,298 (Feb. 15, 1995) (hereinafter *ABA Substantial Transformation Recommendation*); also see Szurgot, *supra* note 140, at 759.

¹⁴⁴ *ABA Substantial Transformation Recommendation*, *supra* note 143, at 298.

requirement, although substantial transformation of the same foreign good in Canada will contribute towards meeting the definition of an "eligible product."

Once the GATT Uruguay Round's Agreement on Government Procurement becomes effective (expected to be January 1, 1996), the U.S. will be bound by its provisions and no longer bound by those of the GATT Tokyo Round's Government Procurement Code.¹⁴⁵

C. U.S.-Canada Free Trade Agreement

The U.S. Canada Free Trade Agreement (FTA)¹⁴⁶ was signed on January 2, 1988 by President Reagan and Prime Minister Mulroney on behalf of their respective countries. The FTA became effective on January 1, 1989 after implementing legislation was approved by Congress¹⁴⁷ and the Canadian Parliament.¹⁴⁸ Unlike the Government Procurement Code, the FTA is a bilateral agreement establishing mutual obligations and benefits which apply only to trade between the U.S. and Canada. This section discussing the FTA is presented primarily for historical interest and as an introduction to NAFTA. The FTA served as a model for the subsequent NAFTA and was largely subsumed into

¹⁴⁵ MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, 103d Congress, 2d Session, House Document 103-316, Vol. 1, 1037 (1994)[hereinafter URUGUAY ROUND DOCUMENTS].

¹⁴⁶ FTA, *supra* note 14.

¹⁴⁷ FTA Implementation Act, *supra* note 107.

¹⁴⁸ An Act to Implement the Free Trade Act between Canada and the United States of America, ch. 65, 1988 S.C. (Can.)(hereinafter Canadian FTA Act].

NAFTA.

The FTA is possibly best known for its agreement to bilaterally eliminate all tariffs on U.S. and Canadian goods by 1998.¹⁴⁹ In addition to tariff elimination, however, agreement was also reached under the FTA on trade issues concerned with energy, financial services, investment, autos, agriculture, wine and distilled spirits, temporary visas, general dispute settlement, countervailing duties and antidumping dispute settlement, softwood lumber, culture, customs user fees, quotas, national treatment, industrial standards, emergency action, and, of course, government procurement.¹⁵⁰ The FTA covers about three-quarters of Canada's merchandise exports and two-thirds of its imports.¹⁵¹ Trade between the two countries has grown substantially since the FTA became effective. In 1988 bilateral trade in goods and services was \$169 billion. By 1992 it had increased \$47 billion in four years to \$216 billion.¹⁵²

Chapter 13 of the FTA covers government procurement. The chapter reaffirms

¹⁴⁹ FTA, *supra* note 14. The FTA divided existing tariffs into three classes: those to be eliminated immediately upon the effective date of the FTA; those to be eliminated over five years in annual stages; and those to be eliminated not later than 1998. *Id.* The FTA also provided for accelerated elimination of tariffs not immediately eliminated upon agreement of the parties. Accelerated tariff elimination procedures have been applied to some 750 tariff line items representing over \$9 billion in bilateral trade. William H. Cavitt, *The Canada-U.S. Free Trade Agreement: Lessons to Guide the Evolution of NAFTA*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT, LABOR, INDUSTRY, AND GOVERNMENT PERSPECTIVES* 4 (Mario F. Bognanno and Kathryn J. Ready eds., 1993)

¹⁵⁰ 1988 TRADE AGREEMENTS REPORT, *supra* note 87, at 23.

¹⁵¹ GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICY REVIEW, CANADA 1992, VOL. 1, 29 (1992).

¹⁵² Cavitt, *supra* note 149, at 69.

the parties rights and obligations under the Government Procurement Code and incorporates the Government Procurement Code as part of the chapter.¹⁵³ Changes to the Government Procurement Code will be incorporated automatically into the FTA¹⁵⁴ but inconsistencies between the provisions of the FTA and the Government Procurement Code will be resolved in favor of the FTA.¹⁵⁵ Chapter 13 limits its application by both procurement dollar amount (it applies only to procurements specified in Government Procurement Code Annex I [incorporated into chapter 13 as FTA Annex 1304.3] that are above \$25,000¹⁵⁶) and by agency making the procurement (it applies only to procurements from governmental agencies listed at FTA Annex 1304.3¹⁵⁷). In essence, as between Canada and the U.S., the FTA retained the same categories of covered contracts as were designated by the Government Procurement Code but reduced the monetary thresholds from \$176,000 (approximate value of the Government Procurement Code's 130,000

¹⁵³ FTA, *supra* note 14, at Arts. 1302 and 1303.

¹⁵⁴ *Id.* at Art. 1303.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at Art. 1304.

¹⁵⁷ *Id.* For Canada, 22 federal departments and 10 federal agencies are covered. The only major exclusions are the transport, communications, and fisheries and ocean departments. The Department of National Defence is included only for purchases of nonmilitary products. The United States has designated some 54 departments, agencies, and boards as covered entities. The DoD is included but limited its participation by excluding goods falling within listed supply categories. The Corps of Engineers is excluded. Both countries reserve the right to invoke the national security and public policy considerations set out at article VIII of the Government Procurement Code as a reason for closing certain procurements to the other.

SDRs) to \$25,000.¹⁵⁸ The general notes accompanying FTA Annex 1304.3 limit the applicability of the FTA to Canadian procurements not set aside for small businesses¹⁵⁹ and U.S. procurements not set aside for small and minority businesses.¹⁶⁰

Article 1305 excludes applicability of the Buy American Act with respect to procurements of "eligible goods" above \$25,000.¹⁶¹ Eligible goods are defined in the FTA as:

unmanufactured materials mined or produced in the territory of either Party and manufactured materials manufactured in the territory of either Party if the cost of the goods originating outside the territories of the Parties¹⁶² and used in such materials is less than 50 percent of the cost of all the goods used in such materials.¹⁶³

FTA article 1305(3) requires Canada and the U.S. to "maintain equitable, timely, transparent and effective bid challenge procedures for potential suppliers of eligible goods."¹⁶⁴ This provision resulted in Canada establishing its Procurement Review Board

¹⁵⁸ As with the Government Procurement Code, the FTA's government procurement chapter covered neither construction nor service contracts.

¹⁵⁹ *Id.* at Annex 1304.3.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at Art. 1305.

¹⁶² FTA chapter 3, entitled Rules of Origin for Goods, contains detailed guidelines as to how to determine whether "goods originate in the territory of a covered party." These rules generally require that goods manufactured from components originating from outside of Canada or the U.S. to have been "transformed in the territory of either party or both Parties so as to be subject to a change in tariff classification" and to other conditions set out at FTA annex 301.2. FTA, *supra* note 14, at Art. 301.

¹⁶³ *Id.* at Art. 1309.

¹⁶⁴ *Id.* at Art. 1305(3).

to adjudicate pre-award government procurement disputes.^{165 166} The U.S. was not required to establish any new adjudicatory body because Canadian firms desiring to protest the award of a contract could already bring such a protest before the General Accounting Office.¹⁶⁷

D. North American Free Trade Agreement

On December 17, 1992, the United States entered into the North American Free Trade Agreement (NAFTA).¹⁶⁸ NAFTA became effective on January 1, 1994 after having been approved by the legislatures of the United States,¹⁶⁹ Canada,¹⁷⁰ and, Mexico.¹⁷¹ For

¹⁶⁵ The Board was established by Part II of the Canadian FTA Act. Canadian FTA Act, *supra* note 148.

¹⁶⁶ For an interesting review of the first year's decisions of the Canadian bid protest tribunal established under the FTA, see Charles W. Levesque, Comment, *Chapter 13 Of The United States-Canada Free Trade Agreement: Has It Created An Open And Effective Government Procurement Dispute Resolution System?*, 12 NW. J. INT'L L. & BUS. 187 (1991). Mr. Levesque concludes that the cases were decided fairly, without bias being exhibited towards either U.S. or Canadian protesting parties.

¹⁶⁷ For example, *Canadian Commercial Corporation*, B-22515, 86-2 CPD para. 73 (1986).

¹⁶⁸ NAFTA, *supra* note 15.

¹⁶⁹ NAFTA Implementation Act, *supra* note 108.

¹⁷⁰ North American Free Trade Agreement Implementation Act, ch. 44, 1993 S.C. (Can.) (printed on August 25, 1993 in Vol. 16, No. 5a of Canada's Official Gazette)[hereinafter Canadian NAFTA Implementation Act].

¹⁷¹ In Mexico, unlike the U.S. and Canada, NAFTA has not been implemented by a single piece of legislation; however, new legislation dealing with certain areas covered by NAFTA has been passed, including a new law on government procurement. Mexico's new procurement law, known as the Law on Procurement and Public Works, rescinded Mexico's previous procurement laws and went into effect January 1, 1994. Steven S. Diamond & Rosemary Maxwell, *Opening the International Government Marketplace: New Developments on the NAFTA, U.S.-EC, and GATT Fronts*, Fed. Cont. D. (BNA) d4,

the United States, President Clinton implemented NAFTA, after receiving Congressional approval, by Presidential Proclamation¹⁷² and Executive Order.¹⁷³

NAFTA's objectives, including national treatment, most-favored-nation treatment, and transparency, are to:

- (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- (b) promote conditions of fair competition in the free trade area;
- (c) increase substantially investment opportunities in the territories of the Parties;
- (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.¹⁷⁴

Although much of the emphasis in negotiations leading to NAFTA was directed at improving U.S. trade opportunities with Mexico, NAFTA also addressed concerns affecting bilateral trade between the U.S. and Canada.

NAFTA expands upon and strengthens the benefits that the United States has enjoyed in recent years as a result of our bilateral free trade agreement [FTA] with Canada. In general, NAFTA provisions will replace parallel sections of the [FTA]. For instance, NAFTA supersedes - - and improves upon - - the [FTA's] rules of origin with respect to some important products, such as autos, textiles, and agriculture. In other areas, such as intellectual property and land transportation, the NAFTA supplements the [FTA], which does not contain such chapters. While the [FTA] covered

Aug. 9, 1994.

¹⁷² Proclamation No. 6441, 58 Fed. Reg. 66,867 (1993).

¹⁷³ Exec. Order. No. 12,889, 58 Fed. Reg. 69,681 (1993).

¹⁷⁴ NAFTA, *supra* note 15, at Art. 102.

over 150 service sectors, NAFTA will improve upon the [FTA] service chapter by extending coverage to all sectors of Canada's \$258 billion services market unless specifically excluded, and by rolling back some existing barriers. In the investment chapter, NAFTA improves disciplines, coverage, and enforcement. In some areas, such as agriculture rules or the exceptions for cultural industries and the U.S. maritime industry, [FTA] provisions have been retained.¹⁷⁵

NAFTA Chapter 10 addresses government procurement.¹⁷⁶ The chapter is modelled on both the Government Procurement Code and the FTA.

In general, the chapter requires the three NAFTA countries to eliminate "buy national" restrictions on the majority of non-defense related purchases by their federal governments of goods and services provided by firms in North America. For the United States and Canada, this represents a further elimination of barriers to participation in each other's government procurement markets, building on the [Government Procurement Code] and the [FTA].¹⁷⁷

Organizationally, chapter 10 follows the scheme of the earlier Government Procurement Code and FTA. A government procurement is subject to the requirements of the chapter if it is (1) for goods, services, or construction services,¹⁷⁸ (2) conducted by specified federal government agencies or specified government "enterprises," (3) that exceed certain monetary thresholds.

¹⁷⁵ MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE NORTH AMERICAN FREE TRADE AGREEMENT, TEXTS OF AGREEMENT, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, 103d Congress, House Document 103-159, Vols. 1 and 2, (1993)[hereinafter NAFTA DOCUMENTS] *available on* WESTLAW, NAFTA database at 1993 WL 561221.

¹⁷⁶ NAFTA, *supra* note 15.

¹⁷⁷ NAFTA DOCUMENTS, *supra* note 175, *available on* WESTLAW, NAFTA database at 1993 WL 561158.

¹⁷⁸ Neither service nor construction contracts were covered under the predecessor Government Procurement Code and FTA.

With respect to trade between Canada and the U.S., NAFTA covers government procurement by designated federal government entities of supplies equal to \$25,000 or more, of services equal to \$50,000 or more, and of construction services equal to \$6.5 million or more.¹⁷⁹ Procurements by designated "government enterprises" are also covered, albeit not until slightly higher thresholds are met.¹⁸⁰ The types of goods covered by NAFTA, and the specific exclusions by country and agency, are listed at NAFTA chapter 10, annex 1001.1b-1. For the U.S. and Canada, the list of goods included and excluded parallels that in the FTA.

Adding NAFTA coverage for service contracts in excess of \$50,000 may be the single most important NAFTA government procurement provision affecting trade between the U.S. and Canada.¹⁸¹ Unless specifically excluded, NAFTA covers all government

¹⁷⁹ NAFTA, *supra* note 15, Art. 1001 and Annex 1001.2c. As between Canada and the U.S., contracts for goods from entities included on the Canadian and U.S. agency lists at NAFTA annex 1001.1a-1 are covered under NAFTA so long as they are for at least \$25,000. This is consistent with the terms of the FTA. Contracts for goods between other than Canada and the U.S., i.e., between Canada and Mexico, or between the U.S. and Mexico, are only covered under NAFTA if they are for at least \$50,000.

¹⁸⁰ Examples of government enterprises included by Canada are Canada Post Corporation, St. Lawrence Seaway Authority, and the Royal Canadian Mint. The corresponding list of the U.S. includes the Tennessee Valley Authority, the St. Lawrence Seaway Development Corporation and the various Power Administrations (Bonneville Power Administration, Western Area Power Administration, etc.). NAFTA, *supra* note 15, at Annex 1001.1a-2. NAFTA covers supply and service purchases by the designated government enterprises of at least \$250,000 and construction services of at least \$8 million. *Id.* at Article 1001(1)(c).

¹⁸¹ As the percentage of the U.S. economy devoted to offering and supporting services, as opposed to goods, continues to grow, opening the Canadian procurement market to U.S. suppliers, and alternatively, permitting U.S. government buyers to consider Canadian service providers, is a milestone.

procurements of services (by covered agencies) so long as they are for at least \$50,000. NAFTA chapter 10, annex 1001.1b-2, contains lists, by country, of service contracts excluded from NAFTA coverage. Both the U.S. and Canada exclude several categories of service contracts from NAFTA coverage. For example, both countries exclude all classes of research and development contracts, all service contracts for the maintenance, repair, modification, rebuilding, and installation of equipment related to ships, and all classes of utility services.¹⁸² Looking solely to the number of categories specifically excluded, however, Canada has chosen to exclude a substantially larger percentage of its total service contracts than has the United States.¹⁸³ For example, Canada has excluded service contracts for guard services, surveillance services, personal care services, transcription services, data collection services, seedling transplanting services, and all classes of health and social services from NAFTA coverage.¹⁸⁴ None of these categories have been specifically excluded from NAFTA coverage by the U.S.¹⁸⁵ Both Canada and the U.S. exclude contracts designated as "set-asides" for small and minority business from the scope of Chapter 10.^{186 187}

¹⁸² *Id.* at Chp 10, Annex 1001.1b-2.

¹⁸³ *Id.* Canada excluded 58 specific categories of service contracts within 17 general classes of service contracts. The U.S. excluded 12 specific categories of service contracts within 6 general classes of service contracts.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at Annex 1001.2b.

The NAFTA chapter 10 annex listing the U.S. and Canadian agencies, departments, and "enterprises" whose procurements are covered by NAFTA is slightly expanded but largely the same as that included in the FTA. For the U.S.,¹⁸⁷ NAFTA adds covered procurements by the Departments of Energy and Transportation¹⁸⁹ and the TVA. NAFTA coverage of DoD procurements is substantially the same as that in the FTA except that the Army Corps of Engineers is now also included.¹⁹⁰ Under NAFTA, the U.S. also added the Bureau of Reclamation, the St. Lawrence Seaway Development Corporation, and certain Department of Energy Power Marketing Administrations.¹⁹¹ For Canada,¹⁹² NAFTA extends coverage of agencies from those listed in the FTA to now include the Departments of Transport,¹⁹³ Communications, Forestry, and Fisheries and Oceans, a considerable number of smaller agencies, and several designated "Crown Corporations," i.e., the St. Lawrence Seaway Authority, the Royal Canadian Mint, the

¹⁸⁷ See page 118 below for a discussion of the effect of the Federal Acquisition Streamlining Act's setting aside most U.S. government contracts for \$100,000 or less to small businesses.

¹⁸⁸ NAFTA, *supra* note 15, at Chp 10, Annex 1001.1a-1(Schedule of the United States).

¹⁸⁹ Adding the caveat that "the national security considerations applicable to the Department of Defense are equally applicable to the Coast Guard, a military unit of the United States." *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at Chp. 10, Annex 1001.1a-1(Schedule of Canada).

¹⁹³ *Id.* Canada includes a "Coast Guard" reservation similar to that of the U.S.: "For purposes of Article 1018, the national security considerations applicable to the Department of National Defence are equally applicable to the Canadian Coast Guard."

Canadian National Railways, and Via Rail. The range of covered products for both the Department of National Defence and the Royal Canadian Mounted Police is substantially the same as that in the FTA.

NAFTA Articles 1008 to 1016 establish procedural safeguards to ensure that the goals of transparency and non-discrimination between products of the three NAFTA countries are met. These provisions are similar to those set out in the FTA, generally requiring advance public notice of upcoming procurements,¹⁹⁴ a general requirement that there be at least 40 days in "open tendering" procurements from publication of information about the procurement until the deadline for receipt of tenders,¹⁹⁵ and a general requirement that tenders be opened "under procedures and conditions guaranteeing the regularity of the opening of tenders."¹⁹⁶ Article 1017 requires that each NAFTA country establish a bid challenge procedure to which any potential supplier may challenge the propriety of award of a contract covered by NAFTA. As was the case under the FTA, the current U.S. bid protest fora meet this requirement and did not need to be amended. For purposes of NAFTA, Canada chose to transfer bid protest jurisdiction from the Procurement Review Board (established upon the implementation of the FTA) to the Canadian International Trade Tribunal (CIIT), an existing tribunal with the powers of a

¹⁹⁴ *Id.* at Art. 1010.

¹⁹⁵ *Id.* at Art. 1012. For more about this "40-day" requirement, see discussion below beginning at page 64.

¹⁹⁶ *Id.* at Art. 1015.

superior court of record.¹⁹⁷

Under NAFTA Article 1004, the rules of origin which determine whether a supplier of goods is entitled to benefits of NAFTA Chapter 10 may not be "different from or inconsistent with the rules of origin the Party applies in the normal course of trade."¹⁹⁸ Under applicable U.S. Customs Service rules, the country of origin of a good is the country in which (1) the good is wholly obtained or produced; (2) the good is produced exclusively from domestic materials; or (3) each foreign material incorporated in that good undergoes a "substantial transformation" such that it is properly reclassified from one tariff classification to another, as further described at 19 C.F.R. s. 102.20.¹⁹⁹ This rule of origin is similar to the general substantial transformation/change in tariff classification applied to most goods under the FTA²⁰⁰ and is less restrictive than the modified BAA-type rule of origin test adopted under the FTA's government procurement chapter 10.

The rules of origin for services are less clear. NAFTA Article 1005 permits a Party to deny the benefits of NAFTA Chapter 10 to a service supplier of another Party where it is established that the service is being provided by an enterprise owned or controlled by persons of a non-Party and which has no substantial business activity in the

¹⁹⁷ Canadian NAFTA Implementation Act, *supra* note 170, at ss. 35 and 44, amending the Canadian International Trade Tribunal Act, R.S.C. 1989, c.47 (4th Supp.)(Can.)

¹⁹⁸ NAFTA, *supra* note 15, at Art. 1004.

¹⁹⁹ 19 C.F.R. s. 102.11 (1995).

²⁰⁰ FTA, *supra* note 14, at Art. 301.

territory of any Party.²⁰¹ With respect to suppliers of either goods or services, a Party may also deny benefits of NAFTA Chapter 10 to an enterprise of another Party which is owned or controlled by nationals of a non-Party if the circumstance of Article 1113(1)(a) (denial of benefits under NAFTA's investment chapter²⁰²) is met or if the denying Party adopts or maintains measures to prohibit transactions with the enterprise.

E. Agreement On Government Procurement

The latest round of multilateral GATT negotiations, referred to as the Uruguay Round because it began in Punta del Este, Uruguay, was concluded on December 15, 1993²⁰³ after close to seven years of intermittent trade negotiations. The new Agreement on Government Procurement, superseding the Tokyo Round's Government Procurement Code, is one of four plurilateral agreements negotiated during the Uruguay Round which will apply to some, but not all, the parties to the Round.²⁰⁴

²⁰¹ NAFTA, *supra* note 15, at Art. 1005.

²⁰² *Id.*, Article 1113 permits a Party to deny benefits to an enterprise "owned or controlled" by investors of a non-Party under two circumstances. First, benefits may be denied in certain instances implicating a Party's foreign policy measures. Secondly, subject to prior notification and consultation, Parties may also deny benefits to enterprises of another Party with no "substantial business activities" in the territory of the Party "under whose laws it is constituted or organized."

²⁰³ Agreement on Government Procurement, *supra* note 13.

²⁰⁴ URUGUAY ROUND DOCUMENTS, *supra* note 145, at page 1037. Signatories to the Procurement Agreement include the following members of the 1979 Government Procurement Code -- Austria, Canada, the member states of the European Union, Finland, Israel, Japan, Norway, Sweden, Switzerland, and the United States -- plus one new member, the Republic of Korea. The Procurement Agreement will enter into force on January 1, 1996 for all members, except that Korea will delay implementation for one year. *Id.*

The Agreement on Government Procurement will become effective as to the signatory parties provided they complete any necessary ratification procedures by January 1, 1996. Congress ratified the Uruguay Round provisions, including the Agreement on Government Procurement on December 8, 1994 with passage of the Uruguay Round Agreements Act.²⁰⁵ The legislation made it clear that the statutory amendments set forth in the Act would not go into effect until the Agreement on Government Procurement takes effect.²⁰⁶ Canada is also a signatory to the Agreement on Government Procurement²⁰⁷ and its legislature has passed the necessary implementing legislation as well.²⁰⁸

Although involving more countries, the Agreement on Government Procurement is similar in many ways to the government procurement chapter in the trilateral NAFTA agreement. The Agreement on Government Procurement substantially broadens the scope of the 1979 Government Procurement Code, both as to the types of procurements covered and as to the procedural safeguards promised by the signatory parties. As with NAFTA,

²⁰⁵ Pub. L. No. 103-465, 108 Stat. 4809. (1994). The Act was largely codified as amendments to the Trade Agreements Act at 19 U.S.C. 2501-2518.

²⁰⁶ *Id.* at s. 344.

²⁰⁷ Agreement on Government Procurement, *supra*. note 13.

²⁰⁸ Canada's House of Commons passed the "World Trade Organization Agreement Implementation Act" (Bill C-57) on November 30, 1994. Once proclaimed, the Act will fully implement Canada's ratification and implementation of the GATT Uruguay Round Agreements. Canada has stated that it is delaying proclamation until "Canada's major trading partners have fulfilled their obligations under the WTO agreement." *GATT: Canadian Parliament Passes Legislation To Implement World Trade Organization*, 12/2/94 Int'l. Trade D. (BNA) d3 (Dec. 2, 1994).

the Agreement on Government Procurement covers the procurement of both goods and services, including construction services.²⁰⁹ The Agreement on Government Procurement also makes a start towards covering sub-central government procurements (state/provincial governments) as well. Importantly, the Agreement on Government Procurement also requires each signatory to establish an independent bid challenge authority to which disappointed bidders may have recourse.²¹⁰ The Agreement on Government Procurement requires that covered procurements abide by certain minimum procedural requirements designed to foster transparency and equal treatment. These procedures, located at Articles VII through XV, specify when limited tendering²¹¹ (less than full and open competition) is permissible, establish methods for qualifying potential suppliers,²¹² notifying potential suppliers of upcoming procurements,²¹³ submitting offers,²¹⁴ and awarding contracts.²¹⁵ These procedures, because of their similarity to the procedures required under NAFTA, will not require a change to either U.S. or Canadian central governmental procurement practices.

Organizationally, the Agreement on Government Procurement is composed of 24

²⁰⁹ Agreement on Government Procurement, *supra* note 13, at Art. 1 (referring to Appendix I of each signatory country).

²¹⁰ *Id.* at Art. XX.

²¹¹ *Id.* at Art. XV.

²¹² *Id.* at Art. VIII.

²¹³ *Id.* at Art. IX.

²¹⁴ *Id.* at Art. XIII.

²¹⁵ *Id.*

articles, to which each signatory has agreed, and, at Appendix I, a set of five additional annexes which are specific to each signatory. The annexes state which public agencies and organizations, including sub-central governmental organizations, within the signatory country are covered by the Agreement on Government Procurement and the minimum contract value (expressed in SDRs²¹⁶) to which the Agreement on Government Procurement applies. The minimum contract value covered typically varies by the type contract and the general category of procuring agency involved. For example, both the U.S. and Canada have included contracts for goods or services from listed central government agencies so long as the contracts are for at least 130,000 SDRs, but have limited construction contracts to those of at least 5 million SDRs.²¹⁷ The lists of central governmental agencies included by Canada and the U.S. are the same as those included in NAFTA.

The United States has also included purchases of goods, services, and construction services from selected agencies in 37 states under the Agreement on Government Procurement. This is the first time that the U.S. has agreed to make state-level purchases subject to international government procurement trade agreement requirements. Although Congress appears to have authority under the Constitution to approve an international

²¹⁶ See explanation of SDRs at note 132 above.

²¹⁷ The contract thresholds agreed to by Canada and the U.S. under the Agreement on Government Procurement do not effect the two countries' obligations with respect to the lower contract thresholds set under the NAFTA government procurement chapter.

agreement binding the states with respect to their procurement practices,²¹⁸ Congress has chosen to only include those states under the Agreement on Government Procurement which volunteered to be included.²¹⁹ Consistent with this policy decision, the specific state procuring agencies, and the resulting percentage of state procurement covered by the Agreement on Government Procurement, vary by state. For example, Colorado²²⁰ includes "all executive branch agencies," while Michigan²²¹ only includes its Department of Management and Budget. At the time the Agreement on Government Procurement was concluded, Canada had not yet identified which sub-central agencies it would include.²²² As result, the U.S. specifically excluded its list of state-level agencies from Agreement on

²¹⁸ James D. Southwick, *Binding the States: A Survey Of State Law Conformance With The Standards Of The GATT Procurement Code*, 13 U. PA. J. INT'L BUS. L. 57, n. 32-35 and accompanying text (1992). Mr. Southwick constructs his position by noting that the GATT multilateral trade agreements are negotiated as non-self-executing executive agreements which, although not treaties requiring the advice and consent of the Senate, do require implementation by Congressional enactment or executive branch regulation pursuant to preexisting statutory authority. Mr. Southwick references Mr. Louis Henkin [FOREIGN AFFAIRS AND THE CONSTITUTION, 175 (1975 ed.)] for the principle that an executive agreement pre-authorized or approved after the fact by Congress has the same force in domestic U.S. law as a treaty. The final pillar of the argument rests on Article VI of the U.S. Constitution which provides that a treaty is the supreme law of the land and prevails over any inconsistent state law.

²¹⁹ Diamond & Maxwell, *supra* note 171. The 37 states which volunteered to be included under the Agreement on Government Procurement include California, Illinois, New York, Florida, and Texas, the five largest states. *Id.*

²²⁰ Agreement on Government Procurement, *Supra* note 13, at Appendix I, Annex 2 (United States).

²²¹ *Id.*

²²² *Id.* at Appendix I, Annex 2 (Canada).

Government Procurement coverage with respect to Canada.^{223 224} As with NAFTA, both the U.S.²²⁵ and Canada²²⁶ have excluded set-aside contracts for small and minority businesses.

Once again, as with NAFTA, the FTA, and the Procurement Code, the Agreement on Government Procurement requires that, within the context of a covered procurement, products of one signatory country be afforded the same treatment as that afforded products of any other signatory countries, including domestic products.²²⁷ Article IV applies the same rules of origin as that applied in NAFTA - the rules of origin applied by the signatory country in the normal course of trade. For manufactured goods, unless there is a change in U.S. practice prior to the January 1, 1996 Agreement on Government Procurement implementation date, this will mean application of the substantial transformation test as evidenced by the proper reclassification from one tariff classification to another.

F. Letter of Agreement

Representatives of the DoD and Canada's Department of Defence Production

²²³ *Id.* at Appendix I, General Note 5 (United States).

²²⁴ Possibly more forthrightly, the U.S. is reported to have refused to include its sub-central governments with respect to Canada because the scope of sub-central governments which Canada reciprocally offered to include was considered inadequate. Diamond & Maxwell, *supra*, note 171.

²²⁵ *Id.* at Appendix I, General Note 1 (United States).

²²⁶ *Id.*, Appendix I, General Notes (Canada).

²²⁷ *Id.*, Art. III.

executed a Letter of Agreement (LOA) on July 27, 1956, effective on October 1, 1956, setting forth policies and procedures designed to cover the majority of contracts for supplies and services placed by the DoD with Canadian suppliers.²²⁸ Subsequent to the LOA's execution, Canadian government reorganization vested the contracting authority of the former Department of Defence Production in the Department of Supply and Services (DSS), recently renamed the Department of Government Services.

Organizationally, the LOA applies to contracts placed by the DoD with the Canadian Commercial Corporation (CCC). The DoD has provided instruction to its contracting officers in the DFARS that contracts with contractors located in Canada should normally be awarded to and administered by the CCC.²²⁹

The Canadian Commercial Corporation is chartered under Canadian law as a Crown Corporation with the purpose of encouraging the export of Canadian products.²³⁰

²²⁸ The LOA was subsequently amended on December 17, 1956, May 31, 1957, January 6, 1961, and October 15, 1962. DFARS 225.7102 Agreement with the Government of Canada. 51 Fed. Reg. 46052, 46212 (1986). The current version of the LOA is maintained by and available through the Foreign Contracting Directorate, Office of the Director of Defense Procurement, DoD.

²²⁹ DFARS 225.870-1(c); 48 C.F.R. 225.870-1(c)(1995). "Contracts with contractors located in Canada should be awarded to and administered by the Canadian Commercial Corporation, except for-- (1) Negotiated purchases for experimental, developmental, or research work unless the contract is for a project under the Defense Development Sharing Program; (2) Purchases of unusual or compelling urgency; (3) Small purchases; or (4) Purchases made by DoD activities in Canada."

²³⁰ Canadian Commercial Corporation Act, R.S.C.1989, c. C-6. Excerpts from the Act follow:

s.3(1) There is hereby established a corporation to be known as the Canadian Commercial Corporation....

s.4 The Corporation is for all its purposes an agent of Her Majesty in right of Canada. R.S., c.C-6, s.3; 1984, c.31, s.14.

It is one of some 50 corporate entities having a combined total of more than 100 subsidiaries and 80 other corporate interests which are owned by the Government of Canada.²³¹ In its 1992-93 annual report, the CCC reported achieving a 15 per cent increase in the dollar value of new contracts over those received in the previous year for a year-end total of \$781 million (Canadian dollars).²³² CCC executive vice-president and chief operating officer Mr. Douglas Patriquin expects to reach \$1 billion (Canadian dollars) in business volume during 1995 and has been challenged by the Canadian government to reach \$1.5 billion (Canadian dollars) in annual sales volume within the next two years.²³³ While more than half of the CCC's orders to Canadian exporters are from U.S. customers,²³⁴ a large proportion of which relate to defense contracts,²³⁵ the CCC is

s.9(1) The Corporation is established for the following purposes: (a) to assist in the development of trade between Canada and other nations; (b) to assist persons in Canada ... (ii) to dispose of goods and commodities that are available for export from Canada;....

²³¹ Neville Nankivell, *Crown Corporations Are "At The Crossroads"*, FIN. POST, Jan. 25, 1994, at 13. Along with the CCC, some of the better known crown corporations include Canada Post Corp., Canadian Broadcasting Corp., the Bank of Canada, and the Royal Mint. *Id.* Collectively, in fiscal year 1992-1993, the crown corporations had assets of \$81 billion (Canadian dollars), employed 117,000, and lost \$1.6 billion (Canadian dollars). *Id.*

²³² *CCC's Annual Report is Tabled in the House of Commons*, CANADA NEWSWIRE, June 17, 1993, available in LEXIS, Canada library, Cnw file.

²³³ Neville Nankivell, *Ottawa's 'Prime Contractor' Must Find New Opportunities - Canadian Commercial Corp.*, FIN. POST, June 8, 1995, at 19.

²³⁴ *12.3 Official Export Credit Programmes*, ECONOMIST INTELLIGENCE UNIT, FINANCING FOREIGN OPERATIONS, April 1, 1994, available in LEXIS, Canada library, Canrep file.

also actively involved in obtaining contracts from other countries as well.^{236 237}

The CCC may be sued²³⁸ by those firms with which it contracts. It also has authority to bring suit in its name in Canadian courts²³⁹ or in U.S. forums.²⁴⁰

²³⁵ *Id.* During its 1994-1995 fiscal year, the CCC assisted Canadian companies in completing \$766 million (Canadian dollars) in sales, approximately \$500 million (Canadian dollars) of which were U.S. defense-related orders. Nankivell, *supra* note 233.

²³⁶ Recently reported contracts from other than the U.S. include a contract with the Royal Norwegian Air Force on behalf of Bristol Aerospace Limited of Winnipeg, Canada for the manufacture of F-5 aircraft wings (*Bristol Aerospace to Manufacture New F-5 Wings for Norwegian Air Force*, CANADA NEWSWIRE, June 17, 1994, available in LEXIS, Canada library, Cnw file), and a contract with the Royal Thai Army on behalf of Bell Helicopter Textron of Mirabel, Quebec, Canada to supply 20 helicopters over a three-year period. (*Chopper Deal*, FIN. POST, Nov. 27, 1993, at 4.) During its recently completed 1994-1995 fiscal year, the CCC helped nearly 300 Canadian companies complete sales to 200 clients in 37 countries. Nankivell, *supra* note 233.

²³⁷ Interestingly, in 1988 the CCC helped finance a \$14 million (Canadian dollars) contract between the Government of Iraq and Ontario, Canada-based Pro-Eco Ltd. Under the contract Pro-Eco set up two production lines in Iraq for cutting thin strips of steel and coating them with paint and other finishes. Although named in a U.S. Congressional report on companies involved in Iraq's efforts to gain western military technology, the CCC denied that the contract had a military side and stated that the metal was suitable for manufacturing consumer products such as appliances. *Howe International, Canadian Commercial Corp. Deny Helping Saddam*, FIN. POST, April 12, 1991, at 4.

²³⁸ MacLaren Corlett formerly McMaster Meighen, Plaintiff v. Mr. Darrell Higgins and RPV Industries (Alberta) Inc., Defendant, No. 64380/92 (Ontario Court of Justice [General Division], Jan. 13, 1994), available in LEXIS, Canada library, Ontcj file. (Plaintiff sought an Order of Sequestration against CCC for funds allegedly in possession of CCC and due and owing to RPV Industries arising from a DoD contract. Order of Sequestration denied upon CCC's showing it had no such funds in its possession).

²³⁹ For example, the CCC was billed \$788,301 (Canadian dollars) in fiscal year 1993-94 by the Winnipeg, Canada law firm of Fillmore and Riley for ongoing legal costs associated with defending CCC interests in a complicated suit brought in Canadian courts by CAE Aircraft Ltd. Ron Eade, *\$45M Government Legal Bill Under Attack; Critics Question Value Of Services But Government Resists Tendering*, THE OTTAWA CITIZEN, June 7, 1994, at A4.

Under the LOA, DoD contracts are awarded to the CCC which then, in turn, awards a subcontract to a Canadian company to perform the work required by the contract. As with the somewhat similar 8(a) contracts under the Small Business Act,²⁴¹ the U.S. has privity with the CCC but has no privity with its subcontractor.²⁴² The LOA precludes the CCC or any other arm of the Canadian Government from charging the DoD a profit, on its own behalf, under contracts it is awarded.²⁴³ The LOA provides that CCC subcontractors, for other than fixed-price contracts, will not be paid at a profit rate in excess of that which is "fair and reasonable" but, in no case will the rate of profit be allowed to exceed any limit prescribed by U.S. statute.²⁴⁴ Bids for fixed-price contracts submitted by the CCC will be denominated and paid in U.S. currency.²⁴⁵ Offers by the CCC for other than fixed-price contracts will normally be required to be denominated in

²⁴⁰ See, for example, Canadian Commercial Corporation/Ballard Battery Systems, B-255642, 94-1 CPD 202 (bid protest action brought before the General Accounting Office); Canadian Commercial Corp., ASBCA No. 37,528, 89-1 BCA 21,462 (contract administration claim brought before the Armed Services Board of Contract Appeals); and Canadian Commercial Corp. v. United States, 202 Ct.Cl. 65 (1973)(Contract administration issue brought before the U.S. Court of Claims).

²⁴¹ 15 U.S.C.A. 637(a)(West Supp. 1995).

²⁴² MacLaren Corlett, *supra* note 232, speaking of the relationship between RPV Industries, the CCC, and the DoD: "CCC is interposed as a middle party with contractual relationships with both the producer and the buyer.... [I]t must be emphasized that there was no contract between the U.S. government and RPV."

²⁴³ LOA, *supra* note 16, at paragraph 2(c).

²⁴⁴ *Id.* at paragraph 2(a).

²⁴⁵ *Id.* at paragraph 3(b).

Canadian currency.²⁴⁶ Should it desire, however, the CCC may submit offers and payment vouchers denominated in U.S. dollars, although it then bears the risk of currency fluctuations.²⁴⁷ The LOA requires that any audits of costs or profits mandated by the terms of the DoD contracts will be accomplished by the Canadian government without charge to the U.S.²⁴⁸ The LOA requires the Canadian government to provide inspectors without charge from its Ministry of Defence to act on behalf of the DoD on contracts awarded the CCC²⁴⁹ although the DoD is not precluded from providing and utilizing its own inspectors "in appropriate cases" should it desire.²⁵⁰ Finally, the CCC agrees that prices set in fixed-price contracts covered by the LOA will not include any taxes with respect to first-tier subcontractors; nor shall prices include custom duties to the extent refundable in accordance with Canadian law, paid upon the import of any materials, parts or components incorporated or to be incorporated in the supplies, with respect to first-tier subcontracts.²⁵¹ A corresponding provision requires the same tax and custom duty responsibilities "to the extent practicable" for cost-reimbursement contracts.²⁵²

G. Implementing FAR Regulations

²⁴⁶ *Id.* at paragraph 3(a)

²⁴⁷ *Id.*

²⁴⁸ *Id.* at paragraph 5.

²⁴⁹ *Id.* at paragraph 6.

²⁵⁰ *Id.*

²⁵¹ *Id.* at paragraph 8(a).

²⁵² *Id.* at paragraph 8(b).

(1) BAA, Government Procurement Code, FTA, NAFTA

The FAR provides implementing guidance to contracting officers with respect to both the Buy American Act and the trade agreements.²⁵³

FAR 25.102²⁵⁴ establishes the basic policy guidance for implementation of the Buy American Act by stating that only domestic end products will be acquired for public use, except articles, materials, and supplies:

- (1) For use outside the United States;
- (2) For which the cost would be unreasonable;
- (3) For which the agency head determines that domestic preference would be inconsistent with the public interest;
- (4) That are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities, of a satisfactory quality; or
- (5) Purchased specifically for commissary resale.²⁵⁵

FAR 25.108(d)(1)²⁵⁶ provides a list of goods which one or more federal agencies have found to be reasonably unavailable domestically in commercial quantities, of a satisfactory quality, under FAR exception 4 to the BAA set out above.²⁵⁷ DFARS 225.108²⁵⁸ adopts this list for the DoD, adds two other unavailable goods,²⁵⁹ and makes

²⁵³ By trade agreements, I mean the Government Procurement Code, the FTA, NAFTA and the Agreement on Government Procurement.

²⁵⁴ 48 C.F.R. 25.102 (1994).

²⁵⁵ Interestingly, the BAA itself includes no specific commissary resale exception.

²⁵⁶ 48 C.F.R. 25.108(d)(1)(1995).

²⁵⁷ The list includes 100 different items, ranging from canned mandarin oranges to bulk tea to chrome ore to bananas.

²⁵⁸ 48 C.F.R. 225.108 (1994).

²⁵⁹ Aluminum clad steel wire and sperm oil.

the determination that each good on the combined list should be considered as domestic for BAA purposes, regardless of their actual origin, when incorporated in an end product or construction material manufactured in the U.S. or in a qualifying country end product or construction material. For definitional purposes, DFARS 225.872-1²⁶⁰ categorizes Canada as one of 16 "qualifying countries."

Under the broad scope of the BAA public interest exception set out at subparagraph 3 above, both the DoD²⁶¹ and NASA FAR supplements²⁶² provide that goods "mined, produced, or manufactured" in Canada will not be subject to the restrictions of the BAA. Conceptually, it may be relatively easy to determine whether a good is mined in Canada, and therefore entitled to the exemption. It may be less clear whether a good is manufactured in Canada.²⁶³ Based on Canada's designation under the BAA as a "qualifying country," however, the DFARS 252.225-7001²⁶⁴ definition of a manufactured qualifying country end product is helpful: "[a]n end product manufactured in a qualifying country if the cost of the components mined, produced, or manufactured in the qualifying country and its components mined, produced, or manufactured in the United States exceeds 50 per cent of the cost of all its components."

²⁶⁰ 48 C.F.R. 225.872-1(1994).

²⁶¹ DFARS 225.872-1(a); 48 C.F.R. 225.872-1(a)(1994).

²⁶² NASA FAR Supplement 1825.103(b); 48 C.F.R. 1825.103(b)(1994).

²⁶³ Interestingly, neither the FAR nor any of its supplements provide any further definition of "produced."

²⁶⁴ 48 C.F.R. 252.225-7001(1994).

Bids or proposals from Canadian companies for contracts for the supply of goods totalling less than \$25,000, but greater than \$2,500, which do not meet one or more of the exceptions set out at FAR 25.102 will be subject to the BAA. Such offers should be evaluated after the appropriate price differential is added - add a 50 per cent differential to the offer when evaluating offers on DoD contracts,²⁶⁵ but only a 6 per cent (if the domestic offer is from a large business that is not a labor surplus area concern) or 12 per cent (if the domestic offer is from a small business or any labor surplus area concern) differential when evaluating offers on other than DoD contracts.²⁶⁶

If the proposed contract for the acquisition of supplies is at least \$25,000, "Canadian end products" included in the contract are exempt from the BAA under the FAR's provision implementing the FTA and NAFTA.²⁶⁷ A Canadian end product is defined at FAR 25.401²⁶⁸ as:

an article that (a) is wholly the growth, product or manufacture of Canada, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

²⁶⁵ DFARS 225.105; 48 C.F.R. 225.105(1994). Consistent with its underlying policy rationale, the DFARS instructs contracting officers not to apply the BAA's 50 per cent differential when application of the factor would not result in the award to a domestic end product, e.g., when no domestic offers are received or when a qualifying country offer is lower than the domestic offer. *Id.*

²⁶⁶ FAR 25.105; 48 C.F.R. 25.105 (1994).

²⁶⁷ FAR 25.402; 48 C.F.R. 25.402(1994).

²⁶⁸ 48 C.F.R. 25.401(1994).

Consistent with NAFTA, FAR 25.402²⁶⁹ also directs agencies designated by the U.S. under NAFTA to ignore the BAA when evaluating offers to provide Canadian construction materials as part of construction projects with an estimated acquisition value of at least \$6.5 million (or \$8 million for the power marketing administration agencies listed by the U.S. as government enterprises). Canadian construction material on projects less than \$6.5 million, regardless of whether it is produced or substantially transformed in Canada, remains subject to the BAA.

FAR provisions also parallel the procedural safeguards to the transparency and openness of the procurement process which are contained in the trade agreements. For example, in the case of traditional open tendering,²⁷⁰ the trade agreements require a minimum of 40 days from notice of a proposed procurement until the earliest date set for receipt of offers.²⁷¹ FAR 25.405 prescribes a slightly more generous minimum solicitation period by requiring at least 45 days for most procurements from the date of notice of a

²⁶⁹ 48 C.F.R. 25.402 (1994).

²⁷⁰ Open tendering procedures are those procedures under which all interested suppliers may submit a tender. Agreement on Government Procurement, *supra*, note 13, Art. VII, paragraph 3(a).

²⁷¹ Article V, paragraph 10, Government Procurement Code; Article 1012, NAFTA; Article XI, Agreement on Government Procurement. The trade agreements each contain provisions permitting the 40-day period to be compressed in the case of a "state of urgency" or in the case of a second or subsequent procurement of a recurring need. Under the trade agreements, the 40 days is measured from the date of notice of impending procurement to the date of bid opening; the trade agreements do not require a minimum separate, specific period within the 40 days specifically set aside for a response time following issuance of a solicitation.

proposed procurement until the date of bid opening.²⁷²

A second illustration also has to do with open tendering. Although the trade agreements establish a clear preference for open tendering procedures intended to promote the "maximum possible competition,"²⁷³ "limited tendering"²⁷⁴ is permitted under a narrow set of circumstances. As example, the Agreement on Government Procurement lists 10 instances under which limited tendering is permitted.²⁷⁵ These include an absence of tenders in response to an open tender, a tender for supplies covered by an exclusive patent or copyright, reasons of "extreme urgency brought about by events unforeseeable by the entity," and a preference for the original supplier in a subsequent procurement of replacement parts to ensure interchangeability with already procured supplies. These circumstances, coupled with the remaining instances listed as permitting limited tendering, are similar, although not exactly the same, as the seven circumstances set out in FAR

²⁷² FAR 25.405; 48 C.F.R. 25.405 (1994). This FAR provision requires the use of the minimum publication and response times set in FAR 5.203 (48 C.F.R. 5.203 (1994)) when NAFTA or the Trade Agreements Act applies. FAR 5.203 establishes two separate time requirements: (1) a preliminary notice of proposed contract action to be published at least 15 days prior to issuance of a solicitation; and (2) a response time of at least 30 days for receipt of bids or proposals (45 days for research and development contracts) following issuance of the solicitation.

²⁷³ Article V, paragraph 1, Government Procurement Code; Article 1016, NAFTA; Article XV Agreement on Government Procurement.

²⁷⁴ Limited tendering procedures are those procedures where the entity contacts suppliers individually. Agreement on Government Procurement, *supra* note 13, Art. VII, paragraph 3(c).

²⁷⁵ *Id.* Art. XV.

6.302²⁷⁶ permitting the use of "other than full and open competition." It is noteworthy that FAR 6.302-3,²⁷⁷ permitting other than full and open competition to sustain necessary industrial mobilization or engineering, development or research capability, is the one exception in the FAR which does not appear to have a directly corresponding provision in the Agreement on Government Procurement. However, the general exceptions to the applicability of the terms of the Agreement on Government Procurement²⁷⁸ contain a broad waiver for those actions which a party "considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurements indispensable for national security or for national defence purposes." This exception, although not located in the section covering limited tendering, appears broad enough to cover most circumstances under which the industrial mobilization /engineering, development or research capability FAR exception might be employed.

A third example concerns the criteria for contract award. Article XIV of the Agreement on Government Procurement permits award only to suppliers which comply with the conditions for participation, submit responsive tenders, and are found to be responsible. FAR 14.407-1²⁷⁹ instructs the contracting officer to use these same

²⁷⁶ 48 C.F.R. 6.302 (1995).

²⁷⁷ 48 C.F.R. 6.302-3 (1995).

²⁷⁸ Agreement on Government Procurement, *supra*, note 13, Art. XXIII, paragraph 1.

²⁷⁹ 48 C.F.R. 14.407-1 (1995).

evaluation factors in awarding contracts under sealed bid procedures. Neither the FAR nor the Agreement on Government Procurement require award to the lowest priced offeror, permitting, instead award to the offer most advantageous to the government.²⁸⁰

(2) Letter of Agreement

The majority of the procurement regulations implementing or addressing the LOA have been initiated by the DoD since the DoD is the U.S. signatory to the agreement. When read in conjunction with the LOA, the FAR and DFARS regulations provide a general guide to procurements with the CCC, progressing from the solicitation stage through completion of contract performance or termination.

DFARS subpart 225.870,²⁸¹ entitled Contracting with Canadian Sources, contains the single largest block of contracting officer direction directed specifically at implementing the LOA. The subpart begins by setting forth Canada's responsibilities:

- (a) The Canadian Government guarantees to the U.S. Government all commitments, obligations, and covenants of the Canadian Commercial

²⁸⁰ The Agreement on Government Procurement permits award to either "the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous." Agreement on Government Procurement, *supra*, note 13, Art. XIII, paragraph 4(a). In those instances in which the lowest tender may not be the most advantageous, its drafters chose to permit award to either offeror while not expressing a preference as to which offeror received the award. FAR 4.407-1 (48 C.F.R. 14.407-1)(1995), on the other hand, requires award to the "responsible bidder whose bid, conforming to the invitation, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation." A strict reading of the FAR provision precludes award to the lowest bidder if its bid is not "most advantageous to the government." The FAR provision, while constraining the action of the contracting officer to a greater extent than does the Agreement on Government Procurement, is not violative of that agreement because the agreement does not absolutely require award to the lowest offeror.

²⁸¹ 48 C.F.R. 225.870(1994).

Corporation under any contract or order issued to the Corporation by any contracting activity of the U.S. Government. The Canadian Government has waived notice of any change or modification which may be made, from time to time, in these commitments, obligations, or covenants.

(d) The Canadian Commercial Corporation, in placing contracts with Canadian or U.S. concerns, uses provisions in the contracts that give DoD the same production rights, data, and information that DoD would obtain in contracts with U.S. concerns.

(e) When contracts are placed with the Canadian Commercial Corporation, the government of Canada will provide the following services, without charge to DoD departments and agencies--

(1) Contract administration services, including--

(i) Cost and pricing analysis;

(ii) Industrial security;

(iii) Accountability and disposal of Government property;

(iv) Production expediting;

(v) Compliance with Canadian labor laws;

(vi) Processing termination claims and disposing of termination inventory;

(vii) Customs documentation;

(viii) Processing of disputes and appeals; and

(ix) Such other related contract administration functions as may be required with respect to the Canadian Commercial Corporation contract with the Canadian supplier; and

(2) Audits. When required, audits are performed by the Audit Service Group, Supply and Services Canada. Requests for audit on non-Canadian Commercial Corporation contracts should be routed through the cognizant contract administration office of Defense Contract Management Command.

(3) Inspection. The Department of National Defence (Canada) provides inspection personnel, services, and facilities, at no charge to DoD departments and agencies.

DFARS 225.870-1; 48 C.F.R. 225.870-1)(1994)

Beginning at the solicitation phase, DFARS 225.870-2²⁸² instructs contracting officers to only include Canadian firms on bidders mailing lists and comparable source lists at the request of the CCC. Whenever a solicitation is mailed to a Canadian firm, a copy should

²⁸² 48 C.F.R. 225.870-2 (1994).

be sent to the CCC.²⁸³ Contracting officers should furnish a copy of a solicitation to the CCC upon its request, even if no Canadian firms are on the bidders mailing list.

As the CCC is the prime contractor, bids or offers are normally transmitted by the CCC to the contracting officer. DFARS 225-870-3²⁸⁴ informs contracting officers that the CCC normally collects bids or offers from Canadian firms and then forwards the bids or offers along with a CCC letter stating the name of the Canadian offeror, CCC confirmation and endorsement of the offer, and a statement that the CCC will subcontract 100 per cent with the indicated firm.²⁸⁵ Upon occasion, there may be insufficient time for the bid or offer to be processed through the CCC before being submitted to the contracting officer. In those instances, the CCC will permit a bid or offer to be submitted directly to the contracting officer. Contracting officers are permitted to consider the bid or offer but, should the Canadian firm be selected, may not actually award a contract without first receiving the confirmation letter from the CCC.²⁸⁶

The basic late bid/offer rules set out in the FAR apply to bids and offers received from the CCC or received directly from Canadian firms. Generally speaking, bids or offers

²⁸³ Canadian firms need not be solicited, even if on the bidding lists, for contracts falling within one of the four stated exceptions at DFARS 225.870-1(c); 48 C.F.R. 225.870-1(c) (1994). These categories are (1) negotiated purchases of experimental, developmental, or research work unless the contract is for a project under the Defense Development Sharing Program; (2) purchases of unusual or compelling urgency; (3) small purchases; or (4) purchases made by DoD activities located in Canada. DFARS 225-870-2(a). 48 C.F.R. 225.870-2(a) (1994).

²⁸⁴ 48 C.F.R. 225.870-3 (1994).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

are late and may not be considered by the contracting officer unless received at the office designated in the solicitation by the time set in the solicitation.²⁸⁷ Along with several other limited exceptions, however, bids or offers which are received late may still be considered if sent by registered or certified Canadian mail not later than the fifth calendar day before the date specified for receipt of bids.²⁸⁸

The DoD has exempted the CCC and its subcontractors from submission and certification of cost or pricing data on all acquisitions.²⁸⁹

The fact that the CCC has submitted a bid or proposal does not change the basic FAR requirement²⁹⁰ that the contracting officer find the apparent contract-awardee responsible before awarding it a contract. Although the guarantee afforded by the Canadian Government covering contractual obligations assumed by the CCC provides a measure of financial security to the contracting officer, it does not guarantee that the CCC's subcontractor will timely and satisfactorily complete performance. Contracting

²⁸⁷ For bids see FAR 52.214-7; 48 C.F.R. 52.214-7 (1994). For offers see FAR 52.215-10; 48 C.F.R. 52.215-10 (1994).

²⁸⁸ *Id.* Although there is also an exception for U.S. Postal Service Express Mail Next Day Service, so long as the bid was sent not later than 5:00 P.M. at the place of mailing two working days prior to the date specified for receipt of bids, there is no similar exception for bids sent express mail through the Canadian postal service.

²⁸⁹ DFARS 215.804-3; 48 C.F.R. 215.804-3(1995). The DFARS provision includes this waiver under the category of "exceptional cases." Presumably, this is intended to come within the exception to the requirements of the Truth in Negotiations Act set out at 10 U.S.C.A. 2306a(b)(1)(B)(2) (West Supp. 1995): "This section need not be applied to a contract or subcontract--(2) in an exceptional case when the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination."

²⁹⁰ FAR 9.103; 48 C.F.R. 9.103 (1994).

officers should still review the capabilities of the proposed subcontractor to assure themselves of the subcontractor's ability to perform. Normally, per DFARS 209.104-4,²⁹¹ a subcontractor will be considered responsible simply because it has been proposed by the CCC. Contracting officers, however, are not bound by this presumption of responsibility, but, rather, are instructed to seek additional information from the CCC if the CCC's endorsement of the subcontractor is not consistent with other information known to the contracting officer.²⁹²

Contracts are awarded directly to the CCC. Following contract award, contracting officers are authorized to communicate directly with the subcontractor so long as the CCC grants its approval to matters involving changes to the contract.²⁹³ If the contract is to be performed using production or research property owned by the Government of Canada, DFARS 245.405(3)²⁹⁴ informs contracting officers that, based on reciprocity, they should not normally expect to have to pay to use the property.

DFARS 225.870-1²⁹⁵ provides that contract administration for DoD contracts with the CCC to be performed by contractors located in Canada will normally be accomplished

²⁹¹ 48 C.F.R. 209.104-4(1994).

²⁹² *Id.*

²⁹³ DFARS 225.870-4; 48 C.F.R. 225.870-4(1994). Although certainly prudent to keep the CCC informed of all changes to the contract, in light of the Canadian Government's waiver of notice of contract change or modification (see DFARS 225.870-1(a); 48 C.F.R. 225.870-1(a)(1994)), this DFARS provision appears to go beyond the strict requirements of the LOA.

²⁹⁴ 48 C.F.R. 245.405(3)(1994).

²⁹⁵ 48 C.F.R. 225.870-1 (1994).

by the CCC.²⁹⁶ This administration is performed by the CCC without charge to the DoD and includes cost and pricing analysis, industrial security, accountability and disposal of government property, production expediting, compliance with Canadian labor law, Customs documentation, and processing termination claims and disposing of termination inventory.²⁹⁷ CCC also provides auditing support, through the Canadian Government, for its contracts either automatically (on payment invoices from cost reimbursement contracts) or, in other instances, at the request of the contracting officers.²⁹⁸ Canada, through its Department of National Defence, will also provide inspection services at no cost for on-site contract quality assurance and/or acceptance before shipment if such inspection services are required by the contract.²⁹⁹ Signature by the Department of National Defence inspector is satisfactory evidence of acceptance for payment purposes.³⁰⁰

Contracting officers may terminate contracts with the CCC for the subcontractor's default or for the convenience of the government. The DFARS states that the CCC will collect termination settlement proposals from its subcontractors, come to a settlement with its subcontractors, and forward the approved settlement proposals to the contracting officer for payment.³⁰¹ Under its prime contract, the CCC may have entered into

²⁹⁶ Non-CCC contracts performed in Canada will be administered by the function awarding the contract or by the Defense Logistics Agency (DLA). DLA has an office located in Ottawa, Canada to assist it in administering its Canadian contracts.

²⁹⁷ DFARS 225.870-1; 48 C.F.R. 225.870-1 (1994).

²⁹⁸ DFARS 225.870-5; 48 C.F.R. 225.870-5 (1994).

²⁹⁹ DFARS 225.870-7; 48 C.F.R. 225.870-7 (1994).

³⁰⁰ *Id.*

subcontracts with either or both Canadian and U.S. firms. Procedurally, the nationality of the subcontractor firm makes a difference in the termination settlement process. The CCC has final approval on settlements for Canadian firms.³⁰² The contracting officer is relegated to simply ensuring that the prime contract is funded sufficiently to cover the settlement payment.³⁰³ For U.S. firms, the CCC forwards settlement proposals to the Defense Logistics Agency office in Ottawa which is then responsible for reaching settlement in conjunction with the contracting officer.³⁰⁴

Although the terms of the LOA limit its applicability to contracts entered into by the DoD or the Canadian Department of Supply and Services, NASA and the Canadian Government have agreed that the LOA will also apply to NASA contracts with the CCC.³⁰⁵ NASA has supplemented the FAR to permit the contracting officer to waive the requirement for certification of cost or pricing data on CCC contracts but not from the requirement to actually provide the cost or pricing data.³⁰⁶ Consistent with the DoD, NASA also supplemented the FAR to recognize a presumption that subcontractors

³⁰¹ DFARS 249.7000; 48 C.F.R. 249.7000(1994).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ NASA FAR Supplement 1815.804-3(e); 48 C.F.R. 1815.804-3(e)(1994).

³⁰⁶ *Id.* However, as stated in the supplement, the certification waiver was only applicable to cost or pricing data submitted from April 1, 1990 through March 31, 1993. *Id.*

submitted by the CCC are responsible.³⁰⁷ Interestingly, NASA included two supplements directing its contracting officers to pay invoices from the CCC (other than fixed-price architect-contracts, construction contracts, and contracts for meats, perishables and dairy products) earlier than the standard contract payment due dates.³⁰⁸ The DoD has no corresponding early-payment provisions in its supplement.

³⁰⁷ NASA FAR Supplement 1809.102-70; 48 C.F.R. 1809.102-70(1994).

³⁰⁸ NASA FAR Supplement 1832.903; 48 C.F.R. 1832.903 (1994) requires early contract payment while NASA FAR Supplement 1832.970; 48 C.F.R. 1832.970 (1994) substitutes "the 17th day" for "the 30th day" in computations under the Prompt Payment Act.

Chapter IV. Contract Formation Issues

Over the years, the Comptroller General has been asked to provide opinions on a number of recurring issues concerning U.S. Government procurements from Canadian sources.³⁰⁹ The decisions reflect an intent to apply the procurement rules evenhandedly, regardless of whether the prevailing party is the U.S. or Canadian Government (Canadian Commercial Corporation) or a U.S. or Canadian bidder/offeror.

A. When May Canadian Firms Properly Be Considered For Award?

(1) Where the LOA applies, awards may only be made to the CCC. Windet Hotel Corp., B-220987, 86-1 CPD 138 (1986) (Canadian hotel protests contracting officer determination that its bid on an Army contract is nonresponsive after directly submitting its bid for consideration rather than submitting it through or with the endorsement of the CCC; protest denied. When the LOA applies, a Contracting Officer may not consider a bid directly from a Canadian firm unless one of the exceptions in the LOA applies.)

(2) Small business issues. If the contracting officer determines there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price, the procurement must be set aside for small businesses. FAR 19.502-2(a).³¹⁰ The Comptroller General will generally view this determination as a business judgment within the contracting officer's

³⁰⁹ The cases in this chapter involve a Canadian product, Canadian supplier, or both. The cases were grouped and brought together for benefit of those seeking a summary of Canadian-specific bid protest case law arising from U.S. fora. Recognize that there well may be additional relevant cases (generally consistent with these holdings) on issues of general applicability, i.e., timeliness of protest.

³¹⁰ 48 C.F.R. 19.502-2(a) (1994).

discretion. Bollinger Machine Shop and Shipyard, Inc., B-258563 (1995 WL 44919, January 31, 1995) (U.S. small business protests CO determination to delete small business set-aside restriction from solicitation after potential Canadian bidder found not to qualify as a U.S. small business; protest denied.); Bartlett Technologies Corp., B-218786, 85-2 CPD 198 (1985) (U.S. small business protests award of sole-source contract to Canadian business by seeking to overturn CO determination that contract should not be set aside for small businesses; protest denied.) However, if a proposed contract is set aside for small businesses, Canadian firms without affiliated production facilities in the U.S. are not eligible to compete. Canadian Commercial Corporation, B-196111, 80-1 CPD 369 (1980) (CCC protests contract award to U.S. small business under total set-aside for small business; protest denied because Canadian firm was not eligible to compete in the procurement.)³¹¹ A Canadian firm is eligible to compete for a small business set-aside contract under certain circumstances, however, if it has a subsidiary in the U.S. The Honorable Ed Zschau, B-224093 (1986 WL 64174, Oct. 15, 1986) (Comptroller General response to inquiry from Congressman Zschau states that USAF award of a total small business set aside contract to a Canadian firm with a Florida subsidiary was proper because regulations of the Small Business Administration permit a foreign entity to qualify as a small business if the firm has a place of business in the U.S., makes a significant contribution to the U.S. economy through the payment of taxes and/or the use of American products and labor, and the firm, including its affiliates, meets the small business

³¹¹ See Canadian Commercial Corporation, B-196111, 80-1 CPD 369 (1980), referenced *infra* at page 89, for a holding under similar facts that the CCC is not an interested party on a 100 percent small business set aside contract.

size standard applicable to the procurement.) Note also Technical Fiberglass, Inc., B-213940, 84-1 CPD 137 (1984) (Comptroller general will not disturb finding of the Small Business Administration that a newly-established U.S. affiliate of a Canadian firm, having no financial or product history in the U.S., does not qualify as a "concern" in the U.S. for purposes of finding the affiliate to be a small business.) Although small business set-aside contracts may not be awarded unless the contract price is reasonable, Canadian firms have had little success in challenging awards on this basis. Canadian Commercial Corporation, B-196-111, 80-1 CPD 369 (1980) (CCC protests award of a total small business set-aside contract by contrasting the "unreasonably high" award price with its submitted "courtesy bid;" protest denied because government may pay a "reasonable premium price" to small businesses.) Solicitations issued as total small business set-asides require bidders to certify that they are both a small business concern and that all end items to be furnished will be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands. FAR 52.219-1.³¹² Bidders can not meet the second portion of this requirement by a promise to furnish end items from Canadian small business firms. New Zealand Fence Systems, B-257460, 94-2 CPD 101 (1994) (Small business protests finding of nonresponsiveness after providing small business set aside certification that it would provide goods from small businesses in Canada; protest denied.)

(3) Goods set aside for U.S. firms by U.S. law. U.S. law requires that the federal government (or in some cases, only the DoD) limit its purchases of a miscellany of goods

³¹² 48 C.F.R. 52.219-1 (1994).

to those produced by U.S. manufacturers. These limitations, many of which are set out in annual budgetary legislation,³¹³ are normally interpreted by the Comptroller General as precluding contracting officers from awarding contracts for otherwise complying goods if they are produced outside the U.S. Stocker & Yale, Inc., B-242568, 91-1 CPD 460 (1991), *reconsid. denied* B-242568.2, 91-2 CPD 379 (1991) (Disappointed bidder protests award to Canadian contractor [through CCC] which failed to meet RFP provision requiring certification that "jewel bearings" would be sourced from U.S. plant. Protest granted.); Marine Industries, Ltd., B-225722, 87-1 CPD 532 (1987), *reconsid. denied* B-225722.2, 87-1 CPD 627 (1987) (Canadian shipyard protests inclusion of a domestic restriction clause in an IFB for procurement of a barge for the Corps of Engineers. Protester alleges that the underlying restrictive statute [10 U.S.C. s 7309] does not apply to vessels supporting Corps of Engineers' civil works projects. Protest denied. Statute does not distinguish between military and civil functions of military agencies.).

Acton Rubber, a Canadian manufacturer of rubber boots, brought two protests within the last five years seeking to determine the specific parameters of the "chemical

³¹³ For example, the following are among the restrictions included in the 1995 DoD Appropriations Act, Pub.L. 103-335, 108 Stat. 2599 (1994): acquisitions of major components of ships funded under the National Defense Sealift Fund must be manufactured in the U.S. (Title V); any agreement to modernize the heating facility in Kaiserslautern, Germany must include the requirement to use U.S. anthracite coal as the base load energy (sec. 8007); and, the DoD is restricted from purchasing welded shipboard anchor and mooring chain 4 inches in diameter and less unless it is manufactured in the U.S. from components which are substantially manufactured in the U.S. (sec. 8026).

warfare protective clothing exception" to the Berry Amendment.³¹⁴ Acton Rubber prevailed in its 1990 protest that "footwear covers, toxicological agents protective," to be manufactured by Acton in Quebec, Canada, fit within the exception. The Comptroller General was persuaded in part because Defense Logistics Agency, the buyer, had purchased the same item from Acton previously after then-determining that the goods fit into the exception. Acton Rubber Limited, B-237809, 90-1 CPD 339 (1990). Possibly buoyed by its win in the 1990 case, in 1993 Acton Rubber protested the rejection of its offer for Canadian-manufactured rubber fireman's boots, asserting that the boots should also fit within the chemical warfare protective equipment exception. The Comptroller General denied the protest after finding that the boots were not designed for use as chemical warfare protective equipment. The fact that Navy firemen might be wearing the boots while engaged in chemical warfare pursuits was not considered sufficient justification for application of the exception. Acton Rubber Limited, B-253776, 93-2 CPD 186 (1993). The Comptroller General made its decision in both cases, in part, based on the history of prior agency determinations in similar situations. "Where an agency's determination of a statute it is charged with administering is reasonable and has been consistently held, we will defer to the agency's interpretation unless it is clearly erroneous." *Id.* at page 2.

Both the Comptroller General and the District Court considered the scope of a

³¹⁴ The "Berry Amendment" is a statutory provision limiting the DoD to procuring only those articles of clothing manufactured in the U.S. The amendment has been commonly included in annual DoD Appropriations Acts since 1941. Congress altered the annual amendment beginning in 1978 by exempting chemical warfare protective clothing from its scope. See Pub. L. No. 95-457, s 824, 92 Stat. 1231, 1248 (1978).

DoD Appropriations Act restriction on the purchase of food "not grown, reprocessed, reused or produced in the United States" in the two Southern Packaging and Storage Company decisions. The GAO initially found that packaging combat rations ("meals, ready-to-eat, individual" or "MREs") in Ontario, Canada was not a violation of the restriction because the ingredients would be received in Canada already cleaned and diced; the only added Canadian input would be the labor needed to mix and place the foodstuffs in the containers. Southern Packaging and Storage Company, B-203400.2, 81-2 CPD 113 (1981). Subsequently, the U.S. District Court for the District of South Carolina, acting under its Scanwell³¹⁵ jurisdiction, sustained a protest by a disappointed U.S. bidder and found that the processing required by the packaging operation in Canada was "production," in violation of the restrictions in the Appropriations Act. In remedy the Court declared the awarded contract (to the Canadian firm) null and void. The court recognized the previous Comptroller General opinion but chose not to defer to its holding. Southern Packaging and Storage Company, Inc. v. United States, 588 F. Supp. 532 (D. S.C. 1984).

(4) Reciprocity of opportunity is not required. An assertion that Canadian law prohibits U.S. companies from being awarded certain Canadian government contracts does not preclude Canadian contractors being awarded U.S. contracts of a similar type. Evergreen Helicopters, Inc., B-215373, 84-2 CPD 62 (1984) (Disappointed U.S. bidder on a Navy aviation services contract protests award to Canadian firm alleging that similar Canadian government contracts are reserved for Canadian firms. Protest denied as failing

³¹⁵ Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

to cite a reason to overturn the award.)

B. Responsiveness Issues.

(1) Bid, payment, and performance bonds. Under the terms of the LOA "the Canadian government guarantees to the U.S. Government all commitments, obligations, and covenants of the [CCC] in connection with any contract or order issued to said Corporation by any contracting activity of the U.S. Government."³¹⁶ As such, government agencies may waive bond requirements for CCC bids because any bonding would be duplicative protection for the U.S. Dohrman Machine Production, Inc., B-236003, 89-2 CPD 344 (1989) (U.S. disappointed bidder protests Navy waiver of bonding requirement for contract-awardee CCC. For evaluation purposes, Navy adjusted CCC bid by the average amount of the other bidder's bond costs. Protest denied. Navy waiver was justified by the LOA.)

(2) Qualified products/ test results. Although conforming to Canadian government standards or having passed Canadian government tests, offered goods are nonresponsive if they fail to meet RFP requirements based on materially different U.S. standards or test procedures. Racal Corporation, B-235441, 89-2 CPD 213 (1989) (Disappointed Canadian bidder protests award of contract using noncompetitive procedures by asserting that it is a demonstrated responsible producer of gas filter canisters under a similar Canadian government technical data package. Protest denied. U.S. technical data package required nerve gas testing, a material difference from the Canadian technical data package.); Sparton of Canada, Ltd., B-242567, 91-1 CPD 475

³¹⁶ DFARS 225.870-1; 48 C.F.R. 225.870-1(1994).

(1991) (Disappointed Canadian bidder protests award of contract limited to a specified U.S. product or an alternate interchangeable product. Canadian bidder supported its proposal of an alternate product with Canadian government test results. Protest denied. Canadian government test results were inconclusive with respect to the full interchangeability required under the contract.)

(3) CCC endorsement. In situations where the LOA requires that a contract with a Canadian contractor be awarded to the CCC, the CCC's proposed subcontractor normally submits its bid package to the CCC which attaches its endorsement and then forwards the complete package to the contracting officer for evaluation.³¹⁷ Procedures have developed, however, to allow the contracting officer to consider bids submitted directly from the proposed subcontractor so long as a CCC endorsement is separately received prior to the due date for bids.³¹⁸ Bids which require but are not accompanied by a CCC endorsement at bid opening are unresponsive. Ronald Campbell Company, B-190773, 78-1 CPD 296 (1978) (Disappointed Canadian bidder protests contracting officer determination that its bid is nonresponsive after failing to submit a CCC endorsement with its bid. Protest denied.); Windet Hotel Corp., B-220987, 86-1 CPD 138 (1986) (Bid from Canadian bidder was nonresponsive when the LOA would have required that contract award be to the CCC but the bid was submitted directly by the proposed subcontractor without any CCC endorsement ever being received). In its decision titled To the Secretary of the Navy, B-168761, 1970 CPD 33 (1970), *reconsid. denied* B-

³¹⁷ DFARS 225.870-3; 48 C.F.R. 225.870-3 (1994).

³¹⁸ *Id.*

168761 (1970 WL 4807), the Comptroller General opined that a bid package which was responsive when submitted to the CCC but was modified by the CCC prior to forwarding to the contracting officer such that it was no longer responsive [certification extending acceptance period to the minimum 90 days was removed by CCC] could not be considered by the contracting officer. Although a CCC endorsement which conditions the terms of the solicitation will make the bid nonresponsive, a CCC endorsement merely requesting a change in the contract terms will not. Canadian Commercial Corporation, B-207777, 83-1 CPD 16 (1983), *reconsid. denied* B-207777.2, 83-1 CPD 275 (1983) (CCC endorsement which included a request for progress payments did not improperly condition a bid where the solicitation stated that bids conditioned on the receipt of progress payments would be considered nonresponsive.) Contrary to the strict sealed bid rule that the CCC endorsement must be in the hands of the contracting officer at the time of bid opening, where a negotiated procurement is involved, the Comptroller General has characterized a failure to initially provide a CCC endorsement as a defect which can "easily be cured through discussion." Leigh Instruments Limited, B-233270, 89-1 CPD 232 (1989).

(4) Late bids. Late bid rules for Canadian bidders/offerors are the same as those for other offerors - late bids/proposals are normally not considered.³¹⁹ Canadian Commercial Corporation, B-214232, 84-1 CPD 226 (1984) (CCC protests the government's rejection of its late proposal which was sent insured mail, rather than registered mail, through the Canadian Postal Service at least five days before the specified

³¹⁹ FAR 52.214-7; 48 C.F.R. 52.214-7 (1994) (late bids). FAR 52.215-10; 48 C.F.R. 52.215-10 (1994) (late proposals).

due date. CCC asserts that the Canadian Postal Service will not register packages in excess of 500 pounds [CCC proposal was approximately 2000 pounds] nor will it certify mail bound for destinations outside Canada. Protest denied because the late proposal did not fall within any of the stated exceptions to the late bid rule.) In a case considering the effect of a late CCC bid endorsement on an otherwise timely bid, the CCC protested that the contracting officer should have considered the bid because the endorsement was "nothing more than [an] administrative arrangement" since the contracting officer had knowledge of the proposed subcontractor's capabilities through previous contracts. Protest denied because the late bid rule also applies to late endorsements. Canadian Commercial Corporation, B-185816, 76-1 CPD 396 (1976).

(5) Currency denomination of bid. Where the LOA applies, a sealed bid from a Canadian firm which is required to be submitted through the CCC is nonresponsive unless it is denominated in U.S. currency. Windet Hotel Corp., B-220987, 86-1 CPD 138 (1986) (Disappointed Canadian bidder protests that its sealed bid was found nonresponsive because of being denominated in Canadian dollars. Protest denied.).

C. Evaluating Bids/Offers.

(1) Canadian government subsidies. Disappointed U.S. bidders have occasionally protested awards to Canadian firms on the basis that the awardees can offer lower prices because they are the recipients of subsidies from the Canadian government. The Comptroller General has been unreceptive to these arguments where the presence or absence of subsidies is not a stated evaluation factor. Cadillac Gage Company, B-209102, 83-2 CPD 96 (1983) ("It would have been improper . . . to have considered the

amount of any Canadian subsidy in the evaluation process since nothing to that effect was stated in the RFP's evaluation section."). The Comptroller General has also recognized that an advantage accruing to a bidder as result of the economic policies of a foreign country is not necessarily an unfair advantage. Fire & Technical Equipment Corp., B-203858, 81-2 CPD 266 (1981) ("[T]he possession of some economic advantage such as the inapplicability of minimum wage standards provides no basis for rejecting a foreign bid. . . . If, after the requirements of the Buy American Act have been satisfied, the foreign bidder remains low, is found to be responsible, and its bid is responsive, then there is no further barrier to an award to that firm."); Teledyne Lewisburg, B-175496 (1972 WL 6144) (1972) ([referring to alleged Canadian government subsidies] "It is obviously not possible to eliminate the advantage which might accrue to a given firm by virtue of other federal, state or local programs. . . . We know of no requirement for equalizing competition by taking into consideration these types of advantages."). See also McGregor Manufacturing Corporation, B-217086, 84-2 CPD 678 (1984) (Disappointed U.S. bidder protests award of non-set-aside portion of an Army Aviation System's Command IFB to a Canadian firm "because its bid price is based on Canadian dollars, which have a lower value when compared to American dollars." Protest denied. "As long as the contractor's competitive advantage is not the result of preference or unfair action by the government, the government is not required to equalize the competitive position of the bidders.")³²⁰

³²⁰ On the surface, largely because of the lack of facts in the reported opinion, this is a somewhat troubling decision. Certainly if the LOA applied to the contract, the bid should have been denominated in U.S. dollars. LOA, *supra* note 16, paragraph 3(b). Drawing on the language in the decision, it may be that the bid was properly submitted in U.S. dollars but, in some manner, was calculated based on an expectation that costs would

(2) Buy American Act. As might be imagined, the Comptroller General has been asked to decide a number of issues concerning the Buy American Act with respect to procurements involving Canadian bidders or Canadian goods. It is clear that the Buy American Act does not preclude award of contracts for Canadian-made goods. Bartlett Technologies Corp., B-218786, 85-2 CPD 198 (1985) (Disappointed bidder protested that a sole-source award to a Canadian firm violates the Buy American Act. Protest denied. "[T]he Buy American Act does not provide a basis for challenging a sole-source procurement since the act does not impose an absolute prohibition on the purchase of foreign-made products, but merely requires a price comparison between competing offers, domestic and foreign.").

The Buy American Act does not apply, however, to Canadian goods purchased by a U.S. prime contractor from a Canadian subcontractor for use in accomplishing the contract but which will not be integrated into the completed construction required under the contract. Mico Mobile Sales and Leasing Company, B-174851, 1972 CPD 30 (1972 WL 5896)(1972) (Disappointed would-be subcontractor protests award of subcontract for Canadian-manufactured mobile office units to be used by prime contractor for its convenience while constructing missile sites in Montana. Protest denied. "The Buy American Act does not apply to purchases made by a contractor solely for his own use and which are not to become a permanent part of the structure or facility being constructed for the government.").

be incurred in lower-valued Canadian dollars.

In many instances, if a good is manufactured in Canada, an exception to the Buy American Act will apply. Questek, Inc., B-232290, 88-2 CPD 166 (1988) (Contracting officer's oral advice that a Buy American Act differential would be applied to Canadian-manufactured goods does not overcome the applicable Buy American Act exemption in the DoD FAR Supplement [DFARS 25.7101³²¹]); Baganoff Associates, Inc., B-179607, 74-2 CPD 56 (1974) (Exercise of discretion by Agency head that "public interest" exception should be applied to designated Canadian-manufactured goods is upheld.). However, not all goods of Canadian origin are covered by exceptions. The Honorable Tom Ridge, House of Representatives, B-223798 (1986 WL 64531) (1986) (Reply to letter from Congressman Ridge offering opinion that proposed purchases by the Corps of Engineers of Canadian sand to be used for "beach nourishment" projects on the Great Lakes was not exempt from the Buy American Act.)

Application of the Buy American Act differentials for evaluating offers is intended for the benefit of U.S. rather than Canadian firms. Under the DoD FAR Supplement, when adding the evaluation differential would not result in the award of a domestic bid, for example if no domestic bids are received, then all offers must be evaluated without the factor.³²² Although Canadian offers are equated with domestic offers for some purposes, the Buy American Act differentials will not afford them any preference over offers from other foreign countries. Canadian Commercial Corporation/Canadian Cordage, Inc., B-247604, 92-1 CPD 518 (1992) (Disappointed Canadian bidder protests award of cordage

³²¹ 48 C.F.R. 225.7101 (1994).

³²² DFARS 225.105; 48 C.F.R. 225.105 (1994).

contract to supplier of Philippine cordage after failure to apply Buy American Act evaluation differential in favor of proposed Canadian cordage. Protest denied. "[T]he applicable regulations make no general provisions for treating Canadian offers as "domestic.").

Most solicitations which anticipate the possibility of receiving bids or proposals offering to provide goods manufactured abroad require the submission of a certificate identifying those goods contained in the bid or proposal to which the Buy American Act applies.³²³ An offeror, including one proposing to provide Canadian-manufactured goods, is bound by what it includes on its certificate but compliance with the certificate is ultimately a matter of contract administration rather than a matter for evaluation leading to contract award. Berema, Inc., B-239212, 90-1 CPD 584 (1990) *reconsid. denied* B-239212.2, 90-2 CPD 356 (1990) (Offeror did not falsely complete Buy American Act certificate by failing to inform contracting officer that the "paving breakers" it intended to furnish were of Japanese rather than Canadian origin because it did not commit itself to furnish any particular breaker.).

A slightly different approach was taken in Bryant Organization, Inc., B-228204.2, 88-1 CPD 10 (1988), where the Comptroller General held that the contracting officer should make his pre-award responsibility determination, in part, on whether he believed the bidder could perform in accordance with its Buy American Act certificate stating contract performance would be accomplished solely with U.S., rather than Canadian

³²³ See for example DFARS 52.225-7005; 48 C.F.R. 52.225-7005 (1994), Buy American--Trade Agreements--Balance of Payments Program Certificate.

materials.

In North Coast Electric Company, B-202208, 81-2 CPD 141 (1981) *reconsid. denied* B-202208.2, 81-2 CPD 282 (1981), the Comptroller General held that a Buy American Act differential was properly applied after a U.S. bidder submitted its Buy American Act bid certificate asserting that transformers to be provided were of Canadian origin. (After losing the award because a Buy American Act differential was added to its bid price, the bidder had attempted to amend its certificate after asserting a belief that the transformers should actually be considered to be of U.S.-manufacture because the majority of the parts making up the transformer were from the U.S. Protest denied. There was no basis for overturning the award when the certificate had been completed "carelessly." On reconsideration, Comptroller General was unconvinced by the disappointed bidder's argument that determining the correct country of manufacture was overly expensive and time consuming because of the multitude of parts making up the transformers.).

(3) Other statutory preferences for U.S. firms. Under 22 U.S.C. 4864, the Department of State is required to give preference to U.S. persons bidding on security contracts at U.S. Foreign Service buildings outside the United States. U.S. Defense Systems, Inc., B-248928, 92-2 CPD 219 (1992) (Disappointed U.S. bidder protests the contracting officer's failure to apply a 5 percent differential in its favor in evaluating proposals on an RFP seeking guard services at the U.S. Embassy in Ottawa, Canada. Protest denied. Bidder was not an interested party because it was not next in line for award, even after applying the differential.).

(4) Application of evaluation criteria. Under provisions of the DoD FAR Supplement,³²⁴ offers of Canadian manufactured end products should be evaluated exclusive of any U.S. customs duty. Metal Forming Systems, Inc., B-229838 (1988 WL 227265) (1988) (Disappointed bidder offering 75 percent Canadian manufactured end product protests evaluation leading to award which included U.S. customs duty. Protest sustained.). Although contracting officers must confine their evaluations to those factors stated in the RFP, contracting officers may consider evaluation factors, such as the location of a firm offering to provide services required in Canada, which are not specifically stated in an RFP but are reasonably related to the specified criteria. Rolen-Rolen-Roberts; Rathe Productions, Incorporated/Design Production, Inc., B-218424.3, 85-2 CPD 113 (1985) (Evaluation that a Canadian firm would be able to perform a services contract in Canada "more effectively" than a non-Canadian firm was not improper because the evaluation factor reasonably related to the specified criteria.) In constructing, and then applying, evaluation factors, contracting officers are under no duty to seek out or highlight factors which will favor Canadian firms. Canadian Commercial Corporation for Hermes Electronics, Ltd., B-209968, 83-1 CPD 672 (1983) (Disappointed Canadian bidder protests that lower standard transportation rates [which were used as evaluation factors] to Canadian destinations were available than which were published in the RFP and that the contracting officer should have sought them out. Protest denied. "We see nothing unreasonable in leaving to the individual offeror responsibility for taking whatever action he deems appropriate to protect his interests, which may include steps to assure

³²⁴ DFARS 252.225-7003; 48 C.F.R. 252.225-7003 (1994).

that freight rates of appropriate carriers are on file.").

D. Responsibility.

(1) Contracting officer responsibility determinations. Under the DoD and NASA FAR supplements there is a presumption that subcontractor bids endorsed by the CCC are responsible.³²⁵ There is no such presumption, however, where the CCC only provides a "conditional" letter of endorsement. Marathon Watch Company, B-247043, 92-1 CPD 384 (1992) (Disappointed Canadian bidder protests contracting officer determination that it is nonresponsible following receipt of a CCC endorsement refusing to certify or guarantee the bidder's performance. Protest denied. "[W]e find that the contracting agency had a reasonable basis for its nonresponsibility determination."). Even with a full CCC endorsement the contracting officer may still investigate the responsibility of a proposed CCC subcontractor if considered appropriate.³²⁶ Questions directed at a proposed subcontractor's capacity and capability are a considered a legitimate part of this responsibility determination rather than being "unilateral discussions" which would otherwise preclude a contract award without first conducting discussions with all offerors in the competitive range. Thermal Reduction Company, B-236724, 89-2 CPD 527 (1989).

The Comptroller General applies its standard approach to protests seeking review of responsibility determinations. Chu Associates, Inc., B-241378 (1990 WL

³²⁵ DFARS 209.104; 48 C.F.R. 209.104 (1994). NFS 1809.102-70; 48 C.F.R. 1809.102-70 (1994).

³²⁶ *Id.*

278637)(1990) (Disappointed bidder protests award to CCC on basis that its subcontractor is nonresponsible because only the protester has access to drawings required to perform the contract. Protest denied. Comptroller General will not review a contracting officer's affirmative determination of responsibility unless the protestor makes a showing of possible bad faith or fraud on the agency's part.); National Council of Fishing Vessel and Safety Insurance, B-239303, 90-2 CPD 127 (1990) (Disappointed bidder protests award to CCC by contesting the contracting officer's determination that the CCC subcontractor is financially responsible. Protest denied. "[W]e generally do not review an affirmative responsibility determination absent a showing of possible fraud or bad faith on the part of procurement officials."). However, the Comptroller General also applies the same standard to bid protests by the CCC or other Canadian bidders contesting responsibility determinations of U.S. contractors. Canadian Commercial Corporation, B-177009 (1972 WL 6089) (1972) (CCC protests award to U.S. contractor by contesting the contracting officer's determination that the awardee was financially responsible. Protest denied. "This office will not question the contracting officer's decision [concerning responsibility] unless it is shown to be arbitrary, capricious or not based on substantial evidence."); Diemaster Tool, Inc., B-238877, 90-1 CPD 375 (1990) *reconsidered* B-2388.3, 91-1 CPD 162 (1990) (Disappointed Canadian bidder protests award to U.S. contractor as nonresponsible which submitted a below-cost or "buy-in" bid. Protest denied. "[T]he contracting officer has made an affirmative determination of . . . responsibility. We will not review such a determination . . .").

(2) Definitive responsibility issues. Definitive responsibility requirements are

specific and objective standards established by an agency to measure an offeror's ability to perform the contract. Stocker & Yale, Inc., B-238251, 90-1 CPD 475 (1990)

(Requirement that offerors, including Canadian offeror's, possess a valid U.S. Nuclear Regulatory Commission license is a definitive responsibility requirement which must be satisfied prior to award.) Agencies may find that an offeror meets definitive responsibility criteria where the offeror does not meet the precise criteria, but has clearly demonstrated that it has equivalent capability. Aero Systems, Inc., B-215892, 84-2 CPD 374 (1984)

(Disappointed U.S. bidder protests award to Canadian bidder which satisfied the RFP's definitive responsibility requirement of an operator's license meeting the requirements of a Federal Aviation Regulation 135 operator's certificate by providing proof it held a similar permit granted by the Canadian government. Protest denied.) Generally, where a bidder fails to provide proof of exact compliance with a definitive responsibility requirement but asserts that it is meeting the requirement by offering to provide an equivalent capability, the contracting officer must investigate the offered capability to determine if it actually meets or exceeds the requirement. Stocker & Yale, Inc., B-238251, 90-1 CPD 475

(1990) (Comptroller General recommends contracting officer determine whether a Canadian offeror which has not met the definitive responsibility requirement to possess a Nuclear Regulatory Commission license has provided the equivalent capability by virtue of its claimed license from the Canadian Atomic Energy Control Board or by virtue of licenses held by its U.S. subcontractors.) However, when the agency investigates the equivalence of an offered alternative, it is under no obligation to provide notice to the offeror or provide the offeror an opportunity to respond in instances in which

determinations of equivalent compliance are properly made by a U.S. agency. Intera Technologies, Inc., B-228467, 88-1 CPD 104 (1988) (Canadian offeror protests a finding that its offer has failed to meet the definitive responsibility requirement to possess a Department of Transportation [DOT] part 375 flight license. Protest denied. Agency properly concluded, after checking with the license granting agency [DOT] that the offeror could not be granted the license because of Canada's failure to meet a U.S. statutory requirement mandating country to country reciprocity prior to granting licenses to foreign firms.)

E. Bid Protests.

(1) Interested parties. The CCC, as a bidder/offeror in line for award, is an interested party for purposes of bringing a protest to the General Accounting Office. Canadian Commercial Corporation/Andrew Canada, Inc., B-257367.2, 94-2 CPD 200 (1994) (CCC protest heard by Comptroller General where its protest alleges that each of the two low bidders ahead of it for award had submitted proposals failing to meet solicitation requirements.) However, where the CCC is not eligible for award, it is not an interested party. Canadian Commercial Corporation, B-196111, 80-1 CPD 369 (1980) (CCC protest dismissed as that of an uninterested party because it is not eligible for award of the contract, a 100 percent set-aside contract for small business.). Recognizing that, for many purposes, the real party in interest in a CCC contract is the Canadian subcontractor, the Comptroller General has accepted protests directly from the disappointed subcontractor without the sponsorship of the CCC. Skidril, Inc., B-241280,

91-1 CPD 90 (1991). Nonetheless, it is much more common for protests to be brought under the sponsorship of the CCC. Subcontractors to CCC subcontractors are not interested parties who can bring protests to the Comptroller General. Damper Design, B-190785, 78-1 CPD 31 (1978) (Potential second-tier subcontractor to the CCC is not an interested party). Similarly, in a case arising under a non-CCC contract, the Comptroller General held that suppliers not in direct privity with the contracting officer are not interested parties. Dunlop Construction Products, Inc., B-234905, ----- (1989) *reconsidered* B-234905.2, 89-1 CPD 469 (1989) (Protest by Canadian manufacturer of roofing materials which was supplying a subcontractor to a subcontractor which was in privity with the prime contractor is not an interested party.) Interestingly, Dunlop was brought, in part, under the theory that the General Accounting Office should hear the protest because the United States-Canada Free Trade Agreement requires establishment of a reviewing authority for deciding bid protests by potential suppliers of eligible goods. The Comptroller General responded by stating that its jurisdiction did not derive from the FTA but from the Competition in Contracting Act of 1984³²⁷ which did not permit it to consider protests from these type suppliers. The Comptroller General also pointed out that Canada, in interpreting the FTA's protest scope, had similarly adopted a definition of "potential supplier" which would exclude consideration of a protest from a supplier unless it was an actual or prospective bidder on the prime contract at issue.

³²⁷ 31 U.S.C.A. ss 3551-3556 (West 1983 and Supp. 1995).

(2) Protest timeliness. Bid protests by the CCC are held to the timeliness standards set out in the General Accounting Office's bid protest regulations.³²⁸ Canadian Commercial Corporation, B-212895.2, 84-1 CPD 129 *reconsid. denied* B-212895.3, 84-1 CPD 262 (1984) (Bid protest by CCC based upon alleged solicitation improprieties which were apparent prior to closing date for receipt of proposals are untimely when not filed by that date); Canadian Commercial Corporation, B-222515, 86-2 CPD 73 (1986) *reconsid. denied* B-222515.2, 86-2 CPD 134 (1986) (Bid protest by CCC based upon being improperly excluded from the competitive range is untimely when filed later than 10 working days after the basis for protest was known); Canadian Commercial Corporation/Andrew Canada, Inc., B-257367.2, 94-2 CPD 200 (1994) (Supplemental grounds of protest which were raised by CCC more than 10 working days after the basis for the additional protests were or should have been known are dismissed as untimely). The Comptroller General has also refused to broaden the use of the "significant issue" exception to its timeliness rules³²⁹ simply because a Canadian bidder has raised the protest. Canadian Commercial Corporation, B-222515, 86-2 CPD 73 (1986) *reconsid. denied* B-222515.2, 86-2 CPD 134 (1986) (Comptroller General refuses to use "significant issue" exception to consider untimely protest that agency "continues to employ illegal procurement practices to the detriment of all Canadian suppliers and contractors." Comptroller General characterizes the specific issues raised - defective specifications and

³²⁸ 4 C.F.R. 21.2 (1995).

³²⁹ 4 C.F.R. 21.2(c) (1995).

late notice of rejection - as ordinary and common protest issues.); Canadian Commercial Corporation, B-212895.2, 84-1 CPD 129 *reconsid. denied* B-212895.3, 84-1 CPD 262 (1984) (Untimely protest concerning applicability of "domestic wool preference provisions" is of insufficient widespread interest to warrant review as a significant issue.).

Chapter V. Post-Award Controversies

Contractors procuring goods from Canadian sources, whether they be U.S. or Canadian contractors, have brought a wide variety of contract administration disputes to the bid fora established under the Contract Disputes Act. Although some have been brought by the CCC, many have been brought by prime contractors other than the CCC following controversies regarding the use of Canadian subcontractors. As with the cases resulting from bid protests, the following contract administration cases have been grouped into similar categories.

A. Jurisdiction. Section 3(c)³³⁰ of the Contract Disputes Act states that the Act does not apply "to a contract with a foreign government, or agency thereof, . . . if the head of the agency determines that the application of the Act to the contract would not be in the public interest." On its face this would appear to preclude CDA jurisdiction to consider disputes brought by the CCC (a public corporation of the Canadian Government). This has not been the case however, because agency heads have chosen not to make the public interest determinations required.

The ASBCA has no jurisdiction to consider a dispute which is submitted directly from the CCC to the Board without first being the subject of a contracting officer's final decision. Canadian Commercial Corporation, ASBCA No. 34257, 88-1 BCA 20,224 (1987) (CCC appeal dismissed by ASBCA for lack of jurisdiction. CCC filed the appeal with the Board by letter without first seeking a final decision of the contracting officer.)

B. Buy American Act Issues. The largest single category of cases has arisen in

³³⁰ 41 U.S.C.A. s 602(c) (West 1987).

connection with the application of the Buy American Act to Canadian-manufactured construction goods. Under the FAR,³³¹ contractors are generally forbidden from incorporating non-U.S. construction materials into construction projects performed in the U.S.³³² Where a contract contains a standard Buy American Act construction clause, contracting officers have the authority to require contractors to replace Canadian goods incorporated into a construction project with U.S. goods. Berkeley Construction Co., Inc., VABCA No. 1962, 88-1 BCA 20,259 (1987) (Contractor properly required to remove a Canadian fuel oil pump it installed in violation of the contract's Buy American Act clause and replace it with a U.S. product); Whitesell-Green, Inc., ASBCA No. 26695, 85-1 BCA 17,934 (1985) (Contractor properly required to remove Canadian and Venezuelan sprinkler pipe installed by its subcontractor in violation of the contract's Buy American Act clause and replace it with U.S. pipe.) Under the standard FAR clause, construction materials are still considered to be of U.S. origin so long as the cost of the U.S. components making up the material exceeds 50 percent of the cost of all its

³³¹ FAR 52.225-5, Buy American Act--Construction Materials (May 1992); 48 C.F.R. 52.225-5 (1994).

³³² Under NAFTA, the Buy American Act's requirements were amended to permit "NAFTA country construction materials" to be incorporated into U.S. construction projects without need of seeking a nonavailability waiver when the construction contract has an estimated acquisition value of at least \$6.5 million (\$8 million for the Power Marketing Administrations). FAR 52.225-15, Buy American Act--Construction Materials under European Community and North American Free Trade Agreements (Jan 1994); 48 C.F.R. 52.225-15 (1994). "NAFTA country construction materials" are defined at FAR 52.225-15(a); 48 C.F.R. 52.225-15(a) (1994), as including construction materials wholly the growth, product or manufacture of Canada or those construction materials, regardless of their original source, which have been substantially transformed into a new and different construction material in Canada.

components.³³³ However, using a somewhat mechanical test, Canadian goods will be classified as separate materials rather than as components of multiple-part materials if the Canadian goods are only integrated into the project after arriving separately at the construction site. Swanson Products, ASBCA No. 33493, 87-1 BCA 19,661 (1987) (Canadian-source metal used for doorframes was not a component of the larger doorframe assembly because the metal was brought to the construction site separate from the U.S. components making up the remainder of the doorframe assembly and was not assembled together with the U.S. components until that point.); The George Hyman Construction Company, ASBCA No. 13777, 69-2 BCA 7830 (1969) (Canadian-manufactured circuit breakers were not a component of the larger "switch gear" because the circuit breakers were brought to the construction site separately from the switch gear and only incorporated into the switch gear after arriving at the site.).

Even in the face of a Buy America Act clause, non-U.S. materials may be used if the contracting officer affirmatively seeks a waiver of the Buy American Act's requirements through a determination that use of U.S. made material is "inconsistent with the public interest" or its cost is "unreasonable."³³⁴ In recent years the Court of Appeals for the Federal Circuit has twice looked at whether waivers of Buy American Act

³³³ FAR 52.225-5(a); 48 C.F.R. 52.225-5(a) (1994).

³³⁴ 41 U.S.C.A. s 10d.(West Supp. 1995). See also FAR 25.202(a); (48 C.F.R. 25.202(a) (1994), providing the following additional two exceptions: "(2) The agency head determines that use of a particular domestic construction material would be impracticable, or (3) The head of the contracting agency or designee determines the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality."

requirements may be granted for the use of Canadian materials after a contract has been awarded. John C. Grimberg Company, Inc. v. United States, 869 F.2d 1475 (Fed.Cir. 1989) (Contractor bid contract based on use of U.S. precast concrete panels. After contract award, U.S. panels were unavailable except at an increased cost and the contracting officer rejected the contractor's requested Buy American Act waiver to permit use of lower priced Canadian panels. Federal Circuit held that, although post-award waivers are discretionary with the contracting officer, the contracting officer abused his discretion in failing to grant this request because of the difference in cost involved.); C. Sanchez and Son, Incorporated, 6 F.3d 1539 (Fed.Cir. 1993) (Contractor sought post-award waiver permitting use of Canadian wire. Federal Circuit affirmed the Claims Court's denial of the appeal from the contracting officer's refusal to grant a waiver. The court found that the information provided the contracting officer by the contractor did not meet the degree of specificity required of a request for waiver.)

C. Delays. Delays occasioned by a contractor's compliance with requirements of the Buy American Act are not compensable. D.J.Simons Construction Co., Inc., ASBCA No. 41336, 93-1 BCA 25,306 (1992) (Where the construction contract included a Buy American Act clause, the contractor was not entitled to an excusable delay adjustment for the time required to substitute U.S. construction material [infrared heaters] for the Canadian materials which were submitted to the contracting officer for approval.). And, of course, delays which do not affect the overall completion of the contract are not compensable. Coffey Construction Company, Inc., VABCA No. 3361, 93-2 BCA 25,788 (1993) (Delay resulting from a slow contracting officer's determination that use of a

Canadian gas filter did not violate the Buy American Act because it was a permitted component of a larger U.S. material was not compensable because it did not adversely affect the overall completion of the project.). In an interesting delay case of several years back, the ASBCA found no excusable delay when a stevedoring firm, under contract to the Royal Canadian Air Force, damaged a crane belonging to a U.S. contractor. Colonial Briard, Inc., ASBCA No. 10993, 67-2 BCA 10,993 (1967). The Board found that the stevedoring firm was not acting as an agent of the contracting officer at the time the damage was incurred, and additionally, that there were concurrent contractor-caused reasons for the delay in contract completion.

D. Use of Canadian Subcontractors. U.S. contractors are not entitled to relief for the added costs of using U.S. rather than Canadian subcontractor when use of the Canadian subcontractor was precluded by a sovereign act of the U.S. Inter-Mountain Photogrammetry, Inc., AGBCA No. 90-125-1, 91-2 BCA 23,941 (1991) (U.S. contractor appeals denial of equitable adjustment resulting from Department of Transportation denial of flight permit for proposed Canadian subcontractor. Appeal denied. Denial of flight permit for services to be performed within the U.S. is a U.S. sovereign act. Contract "permits and responsibilities" clause required contractor to obtain all necessary permits at no additional cost to the government.) A prime contract which was awarded based on a representation that a specific responsible Canadian subcontractor would be utilized may be terminated for default when the prime contractor dismisses the subcontractor. Local Contractors, Inc., ASBCA No. 37108, (1991 WL 517213)(1991) (Contract awarded to U.S. small business was properly terminated for default on theory of

repudiation/abandonment following its dismissal of its Canadian subcontractor. Prime contractor had assured the contracting officer that the subcontractor arrangement would be maintained throughout contract performance.) An assertion that a Canadian subcontractor improperly requested and was paid progress payments which it then failed to use to perform the contract does not excuse the U.S. prime contractor's lack of performance or provide a basis for overturning its termination for default. Bichler Company, ASBCA No. 30680, 89-1 BCA 21,320 (1988) (U.S. subcontractor requested progress payments on behalf of its affiliated Canadian subcontractor directly from contracting officer [with partial concurrence of the prime contractor]. Payments were not applied towards contract performance, contract performance date passed without delivery, and the underlying goods were seized in Canada by the Canadian government for failure to pay Canadian taxes. Appeal of termination for default was denied. Acts of subcontractor were not excusable.)

E. Currency Valuation Disputes. Although the Canadian dollar and the U.S. dollar are roughly equivalent in value, the extent of the difference between the two can make a significant difference in a contractor's costs or profit margin. In The R.H. Pines Corporation, ASBCA No. 24,492, 83-1 BCA 16,395, the Board was asked to consider whether the government was entitled to its claim seeking to modify prior economic price adjustments to the contract price which were made without consideration of the effect of changes in the relative values of the two currencies. The contractor, paid in U.S. dollars, submitted data from its Canadian suppliers showing that prices of the products covered by the economic price adjustment clause had increased. The prices, however, were expressed

in Canadian dollars and the contractor paid the suppliers in Canadian dollars. The failure to consider the effect of the currency fluctuation prior to increasing the contract price "unquestionably resulted in payments to appellant exceeding the manufacturer's price increases." The Board had little difficulty finding compliance with the contract clause's proscription against increasing the contract price in excess of the actual price increase required the contracting officer to consider the effects of currency fluctuation. Beginning in 1957 and continuing at least into the 1970's, ITT-Arctic (and various commonly owned but differently named predecessors) operated and maintained much of the Distant Early Warning (DEW) Line facilities across Canada. The contract at issue in ITT Arctic Services, Inc., ASBCA No. 15630, 72-1 BCA 9188, *aff'd*, 524 F.2d 680, 207 Ct.Cl. 743 (1975), was fixed price in most respects with the exception that the contractor was to be reimbursed for increases in "labor costs." Analogous to the facts in R.H. Pines, the ITT contract was paid in U.S. dollars but ITT paid the majority of its employees in Canadian dollars. ITT claimed that it had incurred reimbursable increases in labor costs as result of currency fluctuations arising from the decision of the Canadian government to allow the value of its currency to "float." The Board, and the appellate Claims Court, interpreted "labor costs" as not having been intended by the parties to include the effects of currency fluctuations. Both decisions noted that currency fluctuations were foreseeable and, in the context of a fixed price contract such as this one, were the risk of the contractor.

F. Canadian Inspectors. Under the LOA,³³⁵ inspection of those portions of CCC contracts performed in Canada is normally accomplished by Canadian inspectors. The

³³⁵ LOA, *supra* note 16, at paragraph 6.

case law holds that these inspectors have the same authority to bind the contracting officer as that of a similar U.S. inspector. Canadian Commercial Corporation, ASBCA No. 17187, 76-2 BCA 12,145 (1976), *reconsid. denied* ASBCA No. 17187, 77-2 BCA 12,758 (1977) (LOA does not grant greater authority to Canadian inspectors than would be exercised by U.S. inspectors on similar contracts performed in the U.S.; claim for added costs resulting from change in test procedures granted when change was concurred in by Canadian inspector who had been granted authority to determine appropriate test procedures.); East West Research, Inc., ASBCA Nos. 42166, 42231, 91-3 BCA 24,187 (1991) (Claim for added packaging costs denied following determination by Canadian inspector that such packaging was already required by the contract specifications.).

G. Tariff/Customs Issues. A contractor is entitled to be reimbursed for the U.S. customs duties it had to pay to import goods from Canada when the payment was necessitated by the contracting officer's failure to coordinate duty-free entry with Customs authorities. Premier Gear & Machine Works, Inc. and H. & K. Constructors, Inc., Joint Venturers, ASBCA No. 9978, 65-2 BCA 5182 (1965) (Contract provided that materials for pipeline modification contract could be imported from Canada into the U.S. duty free upon certification by U.S. government official that goods were required for contract performance. Certifying U.S. official was unavailable and contractor was required to pay duty.) In a somewhat unique case, a Canadian contractor purchased misdescribed goods sight unseen from the U.S. Defense Property Disposal Service and had the goods shipped to Canada. The goods were detained by Canadian Customs authorities for 31 days while the description on the customs declaration was made consistent with the goods

themselves. Upon receiving the goods in Canada, the contractor sought an equitable adjustment on the theory that the actual goods were of less value than the goods as misdescribed. A contract clause required that such a claim be brought within 20 days of delivery of the goods to the control of the purchaser. The ASBCA denied the claim as having been being untimely filed with the contracting officer although it did toll the 20-day claim period for the time the goods were detained in Customs. Hansen & Young Machinery Ltd., ASBCA No. 20096, 75-1 BCA 11,302 (1975).

There are two reported cases seeking to have a now-superseded contract clause titled "Duty-Free Entry--Canadian Supplies"³³⁶ read into contracts after contract award. Muncie Gear Works, Inc., ASBCA No. 16153, 72-1 BCA 9429 (1972); Arvin Industries, Inc., ASBCA No. 13336, 69-1 BCA 7441 (1968). Under the facts, the contracts had been awarded without inclusion of the clause. After contract award, the contractors chose to import certain contract components from Canada and sought to have the clauses permitting duty-free entry added to the contract as no-cost modifications. The ASBCA denied the contractors' appeals in both cases, holding that the decision whether or not to include the clause initially was left to the discretion of the contracting officer. Since there was no indication that the contracting officer had abused that discretion, based on the information he then had available, the Board would not require that the clause be read into

³³⁶ Muncie Gear Works, deciding a dispute arising in 1970, refers to "Duty-Free Entry--Canadian Supplies(1970 Feb), found at ASPR 6-605.5. Arvin Industries, deciding a dispute arising in 1968, uses the same ASPR citation and title to refer to the clause but does not provide a date for the specific version of the clause considered.

the contracts as a matter of law.³³⁷

H. Commercial Impracticability. A Canadian subcontractor (under a CCC contract) was not granted an equitable adjustment in the contract price based on commercial impracticability when it failed to mitigate its damages by delaying several months before availing itself of a contract provision for obtaining resin (required for contract performance but in short supply on the open market) under the Defense Priorities System. Canadian Commercial Corporation, ASBCA No. 21003, 77-2 BCA 12,696 (1977).

I. Releases. A Canadian firm is not excused from the legal effect of a claim release which it executed as part of negotiated change order where the release was left in the change order as a result of the Canadian firm's unilateral mistake. Canadian Commercial Corporation, ASBCA No. 37528, 89-1 BCA 21,462.

J. Terminations for Default. Under provisions set out in the DFARS,³³⁸ CCC subcontractor claims arising as result of contracting officer terminations will be adjudicated and paid by the CCC which will, in turn, forward the claim for reimbursement by the U.S. This has effectively kept the CDA bid fora from deciding quantum appeals of

³³⁷ At least with respect to the DoD, the clauses required today by the DFARS should ensure this particular problem does not arise again. Although the basic FAR Duty-Free Entry clause, found at FAR 52.225-10; 48 C.F.R. 52.225-10 (1994), is only required for "solicitations and contracts over \$100,000 that provide for, or anticipate furnishing to the Government, supplies to be imported into the . . . U.S.," DFARS clause 252.225-7009; 48 C.F.R. 252.225-7009 (1994), Duty-Free Entry--Qualifying Country End Products and Supplies, is required in all solicitations and contracts for supplies and in all solicitations and contracts for services which involve the furnishing of supplies. DFARS 225.872-1; 48 C.F.R. 225.872-1 (1994), lists Canada as a "qualifying country."

³³⁸ DFARS 249.7000(c); 48 C.F.R. 249.7000(c) (1994).

CCC subcontractors following a termination while still permitting the CCC itself to appeal terminations. The CCC has availed itself of this opportunity to appeal terminations, albeit rarely. Canadian Commercial Corporation, ASBCA No. 20067, 75-2 BCA 11,441 (1975) (CCC appeals termination for default of a requirements contract for the failure of its subcontractor to satisfy a delivery order placed by the contracting officer prior to the conclusion of the performance period but not received by the subcontractor [due to normal mailing time] until after the performance period had expired. Appeal denied. So long as the order was placed prior to the end of the contract, the subcontractor was required to perform.).

K. Voluntary Dismissal. At the request of the parties, the GSBCA dismissed a pending appeal without prejudice "because the current Canadian mail strike has made continued processing most difficult." Ronald Campbell Company, GSBCA No. 5890 (1981 WL 7413)(1981). The appeal was dismissed with the proviso that the dismissal would be converted to a dismissal with prejudice if a written request was not received for reinstatement within the next six months. There is no reported record that the case was ever reinstated.

Chapter VI. Procurements By State Governments/State Preference Statutes

State governments, as with their federal counterpart, procure goods and services of many types. Goods from Canada make up some of these purchases. For example, Delta Engineering, based in Ottawa, Canada, announced January 27, 1995, that it was nearly completed with the installation of a wastewater treatment facility in Maine. The facility reportedly uses a new recovery process developed by the company in connection with the Ontario Ministry of Environment and Energy.³³⁹ As another example, in September, 1994, Mitel Corporation, based in Kanata, Canada, announced it had been awarded a contract to provide and install fiber distributed telephone systems for the Texas Department of Mental Health and Mental Retardation.³⁴⁰

State procurements are not covered by the federal procurement statutes, but, instead, are covered by procurement statutes and regulations promulgated by the individual states. To a greater or lesser degree the procurement statutes and regulations of most states include "buy state" or "buy U.S." preferences which often have the effect of discouraging purchases from Canadian sources.³⁴¹ Ohio and Oklahoma provide examples of "buy state" preferences. Under Ohio law,³⁴² Ohio products are preferred in the award

³³⁹ *Ottawa firm to open wastewater plant in Maine*, NO4, VOL. 23, ECO-LOG WEEK, available in LEXIS, News library, curnws file.

³⁴⁰ *Canada: Mitel Corp.'s SX-2000 Light PBX: A Success Story With State Government*, Reuter Textline, Sept. 29, 1994, available in LEXIS, News library, curnws file.

³⁴¹ Southwick, *supra* note 218.

³⁴² Ohio Rev. Code Ann. s 125.11 (1994).

of Ohio contracts so long as the price is not "excessive." Under Oklahoma law,³⁴³ Oklahoma producers bidding on public works contracts are given a price preference equivalent in percentage to any price preference given by the low bidder's state of domicile on its own public contract. State law "buy U.S." preference statutes are exemplified by those of Minnesota and Mississippi. Under Minnesota law,³⁴⁴ "[t]o the extent possible, specifications must be written so as to permit the public agency to purchase materials manufactured in the United States." Under Mississippi law,³⁴⁵ "[s]pecifications . . . shall be written so as not to exclude comparable equipment of domestic manufacture."³⁴⁶

State preference statutes such as those listed above are facing increasing attack. On the one hand, some statutes have been challenged in U.S. courts. Under current case law, as a state preference statute moves closer to providing an absolute preference, providing for no exceptions, and granting no discretion to the awarding contracting officer, the greater the probability it will be overturned. Additionally, outside the realm of U.S. courts, there is a continuing movement within the world community to open all government procurement, including those at the state level, to full international competition. This was most recently seen by the limited inclusion of state government procurements within the scope of the GATT Uruguay Round's Agreement on Government

³⁴³ Okla. Stat. Ann. tit. 61 s 14 (1989).

³⁴⁴ Minn. Stat. Ann. tit. 16B.101 (1988).

³⁴⁵ Miss. Code Ann. tit. 31-7-13 (1994 Supp.).

³⁴⁶ Southwick, *supra* note 218, has an extensive survey of the preference provisions which are contained in the published procurement statutes of each of the states as of 1992.

Procurement.

A. Challenges in U.S. Courts. The leading case upholding state preference statutes upheld a Pennsylvania statute³⁴⁷ requiring state agencies to limit their purchases to products which only included U.S. steel against challenge by a Canadian manufacturer and its U.S. distributor. Trojan Technologies, Inc. v. Commonwealth of Pennsylvania, 916 F.2d 903 (3d Cir. 1990), cert. denied, 501 U.S. 1212, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991). The statute required that suppliers contracting with a public agency in connection with a public works project provide products whose steel is American-made.³⁴⁸ The statute provided that payments made in violation of the Act were recoverable directly from the contractor, subcontractor, manufacturer or supplier who did not comply with the Act,³⁴⁹ and further provided that willful violators of the Act were prohibited from bidding on public agency contracts for five years.³⁵⁰ Under the facts of the case, Trojan, a Canadian manufacturer, had sold water-disinfection systems to several Pennsylvania municipalities. Steel made up approximately 15 percent of the cost of each unit. After the Pennsylvania Attorney General began seeking information from the buying municipalities as to compliance with the Act, Trojan initiated an action seeking to have the Act found

³⁴⁷ Pennsylvania Steel Products Act of March 3, 1978, P.L. 6, No. 3, Pa.Stat. Ann. tit. 73, ss 1881-87 (1993).

³⁴⁸ *Id.* at s. 1884.

³⁴⁹ *Id.* at s. 1885(a).

³⁵⁰ *Id.* at s. 1885(b).

unconstitutional. Trojan raised five separate arguments,³⁵¹ each of which the court ultimately found unconvincing. For our purposes, the first three arguments are the most relevant: 1) whether the Act is preempted by the U.S.-Canada Free Trade Agreement (FTA), by the 1979 GATT Government Procurement Code, or by other U.S. federal trade legislation, 2) whether the Act unconstitutionally burdens foreign commerce, and 3) whether the Act interferes with the federal government's exercise of the foreign relations power.³⁵²

Although recognizing that the provisions of the federal legislation implementing the FTA overrode any conflicting state legislation,³⁵³ the Court had little difficulty finding that the Act did not violate the FTA.³⁵⁴ The Court noted that the government procurement portions of the FTA, by its terms, only applied to those agencies and instrumentalities which Canada and the U.S. designated within the FTA itself.³⁵⁵ Neither Canada nor the U.S. included state/provincial governments, although there was language suggesting negotiations toward that end at some point in the future.³⁵⁶ The Court applied similar analysis with respect to the 1979 GATT Government Procurement Code. The Act

³⁵¹ 916 F.2d at 904.

³⁵² The additional two issues looked to whether the Act is unconstitutionally vague and whether the Act violates the equal protection clause. 916 F.2d at 904.

³⁵³ *Id.* at 906.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 907.

³⁵⁶ *Id.*

did not violate any provision of the Code because the Code was not intended to apply to sub-central government procurements.³⁵⁷ At Trojan's request, the Court also looked to provisions of the Steel Import Stabilization Act,³⁵⁸ the Trade Act of 1974,³⁵⁹ and the Trade Agreements Act of 1979³⁶⁰ but could find no indication that Congress intended those statutes to preempt state purchase-preference statutes.

In looking at the Commerce Clause, the Court focused on whether the Act violated that aspect of the Commerce Clause referred to as "the negative commerce clause," or "dormant commerce clause." This constraint prohibits many discriminatory state regulations designed to promote local enterprise at the expense of that from other states or foreign countries.³⁶¹ The court, however, found that Pennsylvania's actions were taken in its role as "market participant" rather than as a "market regulator." "[A] state or state subdivision that acts as a market participant, rather than a market regulator 'is not subject to the restraints of the Commerce Clause.'"³⁶² The court explained the market participant doctrine as protecting "states when they are acting as parties to a commercial

³⁵⁷ *Id.* at 908.

³⁵⁸ Pub.L. 98-573, Title VIII, ss 801-808, 98 Stat. 3043-47 (1984), codified at 19 U.S.C.A. s 2253 note (West Supp. 1990).

³⁵⁹ Pub.L. 93-618, 88 Stat. 1978 (1974) (codified as amended in scattered sections of 5 U.S.C., 19 U.S.C. and 31 U.S.C.).

³⁶⁰ Pub.L. 96-39, 93 Stat. 144 (1979) (codified as amended primarily in scattered sections of 19 U.S.C.).

³⁶¹ 906 F.2d at 909.

³⁶² *Id.*, quoting from White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 208, 103 S.Ct. 1042, 1044, 75 L.Ed.2d 1 (1983).

transaction rather than (as, for example, when adopting a tax scheme) they are acting as market regulators."³⁶³

The court also refused to find that the Act unconstitutionally involved the state in the actual conduct of foreign affairs, clearly noting that such conduct is exclusively reserved to the federal government.³⁶⁴ The court noted that state actions which only had some incidental or indirect effect in foreign countries did not infringe on the powers of the federal government.³⁶⁵ The court made its decision after reviewing the Act and determining it had been drafted to apply equally to the products of all foreign countries - it was not designed so as to permit Pennsylvania officials to discriminate between specific foreign countries, thus opening the federal government to "disruption or embarrassment"³⁶⁶ as result of the state actions.³⁶⁷

Trojan is important because it clearly upheld the right of a state government, acting

³⁶³ 906 F.2d at 910.

³⁶⁴ *Id.* at 913.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ The New Jersey Superior Court came to a similar decision in the 1988 case of Delta Chemical Corporation v. Ocean County Utilities Authority, 231 N.J. Super. 180, 554 A.2d 1381 (1988), holding that a state "buy American" requirement did not impermissibly intrude into the federal government's power to direct foreign affairs because the preference provision did not absolutely mandate the purchase of U.S. products, regardless of cost, quality or other factors. Contrast its holding with the earlier California case of Bethlehem Steel Corp. v. Bd. of Comm'rs of Dept. of W. & P., 276 Cal.App.2d 221, 80 Cal.Rptr. 800 (App.1969), where the court held that the California Buy American Act requiring that only materials manufactured in the U.S. be purchased by governmental bodies violated the U.S. constitution by impermissibly interfering with the federal government's control of foreign affairs

with respect to its own purchases (i.e., as a "market participant"), to prefer goods of the U.S. over those of foreign countries, including Canada.³⁶⁸ In the five years since Trojan was decided, both NAFTA and the GATT Uruguay Round's Agreement on Government Procurement have been adopted by the U.S. Had the court also reviewed these later agreements, it does not appear that the outcome would have changed. Under the government procurement provisions of NAFTA, as with the FTA, sub-central government procurements are not covered.³⁶⁹ It becomes a bit more complicated with the Agreement on Government Procurement. Although sub-central government procurements are covered, to a limited degree, under the Agreement on Government Procurement, the extent of the coverage is clearly circumscribed.³⁷⁰ As such, it would appear that a state

³⁶⁸ The 4th and 9th Circuits have each recently affirmed this "market participant" approach in decisions upholding the validity of state purchase preference statutes. Smith Setzer & Sons, Incorporated v. South Carolina Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994); Big Country Foods, Inc. v. Board of Education of the Anchorage School District, Anchorage, Alaska, 952 F.2d 1173 (9th Cir. 1992).

³⁶⁹ NAFTA Article 1001 limits the applicability of the NAFTA Government Procurement chapter to measures adopted or maintained by a NAFTA Party relating to procurement "by a federal government entity set out in Annex 1001.1a-1, a government enterprise set out in Annex 1001.1a-2, or a state or provincial entity set out in Annex 1001.1a-3 in accordance with Article 1024." Article 1024 requires that the Parties immediately begin consultations with their state/provincial entities with the goal of voluntarily adding them to the list of covered entities. To date, no state or provincial entities have been listed by any of the Parties at Annex 1001.1a-3.

³⁷⁰ Article III, paragraph 1, of the Agreement on Government Procurement requires "national treatment" between the Parties for products or services of the Parties offered in response to a covered government procurement. Although this "national treatment" requirement would seem to preclude the applicability of domestic preference statutes, the provision is only applicable to certain, designated categories of procurements. Annex 2 to the Agreement lists the sub-central government entity procurements which the U.S. has made applicable to the Agreement. The list includes part or all of the procurement actions of 37 of the states of the United States. As an additional

purchase preference law would still be valid where not precluded by the terms of the Agreement. There should be no doubt that a state purchase preference statute would still be valid as against the products of a country which has not entered into the Agreement. With respect to countries which have entered the Agreement, validity of the state law should be determined based on whether the U.S. has made a bilateral commitment with the signatory country that the list of sub-central agencies included in the Agreement will be applicable.

B. International Agreements. As noted above, the Uruguay Round Agreement on Government Procurement covers a limited range of sub-central government procurements (but not including U.S. sub-central government procurements by Canadian bidders) with the goal of opening the procurements to additional competition on a fair, unbiased, and transparent basis. As of April 15, 1994, the date the Agreement was signed, only the European Union, Israel and Korea had undertaken sufficient commitments with respect to the United States to warrant reciprocal coverage of U.S. sub-central entities. With respect to Canada, one commentator has suggested that the central Canadian government may lack authority to bind its provinces to such an agreement.³⁷¹

limitation, the Agreement permits each signatory to negotiate coverage on a reciprocal, bilateral basis with other signatories. With respect to Canada, the United States has chosen to exclude sub-central government procurements from the Agreement's coverage. Agreement on Government Procurement, *supra* note 13, Annex 1, General Note 5.

³⁷¹ Greg N. Anderson, Comment, *Achieving United States-Canadian Reciprocity in Sub-National Government Procurement: Federalism and the Canada-United States Free Trade Agreement*, 4 IND. INT'L & COMP. L. REV. 131 (1993).

As pointed out by Southwick³⁷² many of the specifics of current state procurement laws appear to be contrary to the provisions of the Agreement. To avoid violating the Agreement's provisions these state laws must be amended prior to the January 1, 1996 Agreement effective date, at least with respect to those state governmental entities covered by the Agreement and those signatory countries with which the U.S. has bilaterally agreed that its sub-central governmental procurements will be covered.³⁷³ The United States Trade Representative has stated that it will provide the states written detailed guidance on how to implement the Agreement and work closely with state government officials, and, in particular with the National Association of State Purchasing Officers and the National Governors Association, to facilitate implementation.³⁷⁴

³⁷² Southwick, *supra*, note 218.

³⁷³ To facilitate administration by minimizing the extent to which differing laws and regulations apply to different bidders on the same procurement, it may be that states choose to "liberalize" their procurement laws and regulations for all bidders, regardless of national origin. This approach would seem likely to work well for those Agreement provisions requiring bid protest forums, certain minimum times to respond to tender offers, and so forth. On the other hand, with respect to purchase preference statutes, the states may choose simply to exclude countries and procurements covered by the Agreement but leave the preferences otherwise intact.

³⁷⁴ URUGUAY ROUND DOCUMENTS, *supra* note 145, at Vol 1, pg. 376.

Chapter VII. A Look Into The Future: Factors Suggesting Continued Change

Bilateral government procurement between Canada and the U.S. is impacted by, and to a lesser degree impacts, numerous issues and events in the U.S., Canada, and other parts of the world. This section explores the extent to which some of those issues and events may have an effect over the next several years.

A. Continuing Move Towards Multilateral Trade Agreements. The last several years have seen a continuing emphasis on multilateral trade agreements - both worldwide (GATT/WTO) and geographic (FTA, NAFTA) in scope. These agreements, and their government procurement annexes, have increased the openness of the U.S. government's procurement system to foreign goods, including Canadian goods, and, in turn, increased the opportunities for U.S. manufacturers to sell goods to foreign governments. This trend is expected to continue. For example, the current NAFTA countries have declared their joint support of Chile's request to become the fourth NAFTA country.³⁷⁵ On a more ambitious note, trade ministers of 34 Western Hemisphere countries are scheduled to meet at the end of June, 1995 to discuss steps necessary to introduce a Free Trade Area of the Americas by 2005.³⁷⁶ U.S. Trade Representative Mickey Kantor announced that NAFTA would be used as the "benchmark" for designing the proposed FTAA.³⁷⁷ A third example of this trend is Canada's expressed interest in entering into a free trade agreement

³⁷⁵ Rossella Brevetti, *NAFTA 'Amigos' Invite Chile To Begin Accession Talks*, 11 Int'l Trade Rep. (BNA) 1914 (Dec. 14, 1994).

³⁷⁶ *Trade Ministers To Meet In Denver For June Ministerial To Plan FTAA*, 12 Int'l Trade Rep. (BNA) 305 (Feb. 15, 1995).

³⁷⁷ *Id.* at 306.

with Israel.³⁷⁸ The U.S. and Israel entered into a bilateral free trade agreement in 1985.³⁷⁹ Should Canada and Israel also enter such an agreement, it might be expected that the two separate agreements would be joined as a trilateral agreement at some point in the future. Although these, and other yet unseen trade agreements, have the effect of broadening the Canadian and U.S. government procurement marketplaces, they can also be expected to "dilute" the "special relationship" between Canadian producers and U.S. government procurement buyers, as evidenced by the LOA.³⁸⁰ As additional countries receive the same access to the U.S. procurement market now experienced by Canada, the percentage of the U.S. procurement market now met with Canadian goods may decrease. The issues surrounding product origin will probably also become more complicated for contracting officers procuring goods from Canadian sources - since the agreements will likely provide for Buy American Act exemptions for goods from any of the covered countries, a contracting officer procuring a good from a Canadian source but which does not "originate" in Canada will be faced with the need of determining whether the good was produced in any (or several) of the countries party to an applicable international trade agreement.

³⁷⁸ *Also In The News*, 11 Int'l Trade Rep. (BNA) 1861 (Nov. 30, 1994).

³⁷⁹ U.S.-Israel Free Trade Agreement, entered into force Aug 19, 1985, Int'l Legal Materials, Vol. XXIV, No. 3, May 1985.

³⁸⁰ There is no indication, however, that any of the proposed multilateral agreements will incorporate such provisions of the LOA as currently require that certain contracts be awarded through a foreign government corporation (CCC) or that the foreign government corporation will provide a responsibility determination, inspection services, and audit services.

B. Domestic Canadian Issues. To possibly a greater degree than with the U.S., Canada appears to be a nation in transition. Quebec, and the remainder of the country, are continuing to question whether they will remain united, while the central government has been forced to embark on a more austere budget than in recent years in an attempt to counteract a sizeable budget deficit resulting from a broad social services program.

Quebec Premier Jacques Parizeau, a proponent of independence for Quebec, has promised a province-wide referendum on independence during 1995 but no date has yet been set.³⁸¹ Although Mr Parizeau's supporters control the provincial legislature (National Assembly), opinion polls indicate that the majority of Quebec's citizenry are not seeking full independence, but rather a more independent Quebec which is still a Canadian province.^{382 383} However, should Quebec seek and be granted independence, a plethora of changes would affect U.S. procurements from Canadian sources, not all of which would likely be resolved in the near term. A report from the U.S. Congressional Research Service warns that independence for Quebec may result in a "slow, painful, and costly"

³⁸¹ *Independent Quebec Would Seek To Join NAFTA, GATT Under Proposed Legislation*, 11 Int'l Trade Rep. (BNA) 1919 (Dec. 14, 1994) [hereinafter *Independent Quebec*].

³⁸² *Id.*

³⁸³ A similar prediction was made in a March 6, 1995 "Ten-Year Growth Outlook" focusing on Canada: "[T]he direct constitutional threat to the federation-in the form of the potential separation of Quebec from the rest of Canada-will die down following the expected rejection of the sovereignty referendum." *Economic forecast-Ten-year growth outlook*, Economist Intelligence Unit Country Forecast, March 6, 1995, available in LEXIS, Canada library, Canrep file.

adjustment process for Quebec, the remainder of Canada, and the U.S.³⁸⁴ Among others, these changes would likely require decisions on the extent, if at all, the LOA, NAFTA, GATT, and Canada's other international trade agreements were recognized as being applicable to a newly independent Quebec.

Canadian finance minister Martin announced March 3, 1995 that Canada's federal budgets for 1996 and 1997 would reduce spending by a combined total of C\$10.4 billion over current levels, with most savings coming from a sharp reduction in the size of the federal work force.³⁸⁵ Spending cuts will also affect subsidies to businesses and reduce the national defence budget.³⁸⁶ These domestic spending cuts may well encourage Canadian firms, particularly those in the defense industry, to more aggressively seek U.S. government procurement contracts. At the same time, opportunities for U.S. firms to effectively compete in the Canadian defence market will likely be reduced to some degree - a smaller Canadian defence budget not only reduces the total procurement dollars available for award but also, almost inevitably, increases protectionist pressures (formal and/or informal) designed to safeguard domestic industries.

The Canadian government takes an active role in promoting exports of its products. A recent example, which may have some effect on awards of U.S. contracts to Canadian producers, is the government's newly-initiated programs to guarantee progress

³⁸⁴ *Independent Quebec*, *supra* note 381.

³⁸⁵ *Economic Policy: Government Spending Will Be Hardest Hit*, Economist Intelligence Unit Country Report, March 3, 1995, *available in* LEXIS, Canada library, Canrep file.

³⁸⁶ *Id.*

payments to Canadian exporters. Under the programs, the CCC³⁸⁷ or the Export Development Corporation,³⁸⁸ both Canadian governmental corporations, will work with Canadian exporters and Canadian banks to arrange progress payments, thus enabling Canadian contractors to compete for contracts for which they might not otherwise be able to financially compete. The CCC program is particularly aimed at smaller Canadian businesses.³⁸⁹ As Canadian businesses become more familiar with the programs, U.S. contracting officers may begin receiving more bids from Canadian sources in response to solicitations which don't include a progress payments clause.

C. Canada-U.S. Trade Relations. As each other's largest trading partners, both Canada and the U.S. keep close watch over the bilateral trading relationship - each attempting to maximize its own economic interests³⁹⁰ and each affected by domestic political pressures, but each also committed to maintaining the strength of the underlying relationship. Two related issues provide an example. According to figures released Feb 17, 1995 by Statistics Canada (a Canadian governmental department), Canada's trade

³⁸⁷ Wyng Chow, *New Program Eases Strain Of Financing Overseas Sales*, VANCOUVER SUN, Jan. 19, 1995, at D3.

³⁸⁸ *Canada's Export Financing Agency To Start Project Finance Team In 1995*, 12 Int'l Trade Rep. (BNA) 698 (Apr. 19, 1995).

³⁸⁹ Chow, *supra* note 387.

³⁹⁰ For example, U.S. Trade Representative Mickey Kantor announced on April 29, 1995 that Canada was being placed on a special international trade "watch list" because the U.S. is concerned about current policies of the Canadian Radio-Television Communication Commission which discriminate against non-Canadian (U.S.) television services. *USTR Announcement On Foreign Government Procurement (Title VII) And Intellectual Property Protection (Special 301)*, 12 Int'l Trade Rep. (BNA) 18 (May 3, 1995).

surplus (goods, services, and tourism) with the United States reached a record \$19.9 billion in 1994, up \$6.09 billion from 1993.³⁹¹ ³⁹² (All figures in U.S. dollars.) The trading surplus with the U.S. made a significant contribution towards Canada's overall 1994 merchandise trade surplus of \$12.0 billion.³⁹³ Canada's surplus contrasts sharply with the overall U.S. trade deficit (goods and services, and tourism) for the same period of \$105.37 billion.³⁹⁴ However, less than two months after release of the Canadian trade figures, Canada's International Trade Minister, Mr. Roy MacLaren released the 1995 edition of the Canadian government's Register of United States Barriers to Trade citing numerous ongoing trade barriers which serve to limit full Canadian access to the U.S. market.³⁹⁵ Among others, the report highlighted "trade barriers" resulting from U.S. governmental subsidies, trade remedy laws, technical and regulatory barriers, and agricultural barriers.³⁹⁶ In the government procurement area, the report noted the "Buy

³⁹¹ *Canadian Trade Surplus With U.S. Reached \$19.9 Billion In 1994*, 12 Int'l Trade Rep. (BNA) 348 (Feb. 22, 1995) [hereinafter *Canadian Trade Surplus*].

³⁹² The 1995 Canadian trade surplus with the U.S. may be even greater, based on figures gathered through the end of March 1995. Per a Statistics Canada report, Canada's trade surplus with the U.S. for the first three months of 1995 was \$6.16 billion (U.S. dollars), up 60 percent when compared with the same period for 1994. *Balance Of Trade: Canadian Trade Surplus Down In March; Jan.-March U.S. Deficit Up 60 Percent*, 12 Int'l Trade Rep. (BNA) 21 (May 24, 1995).

³⁹³ *Canadian Trade Surplus*, *supra* note 391.

³⁹⁴ *\$155 Billion Trade Deficit The 2nd Worst In U.S. History*, CHI. TRIB., March 15, 1995, Business at 1.

³⁹⁵ *International Trade, U.S. Barriers Still In Place, Says 1995 Canadian Register*, 1995 Daily Rep. for Executives (BNA) 65 (Apr. 5, 1995).

³⁹⁶ *Id.*

America" legislation, the continuing Berry Amendments limiting procurement of certain goods to those from U.S. manufacturers, and small business set-asides limiting certain contracts to small and minority-owned U.S. firms.³⁹⁷ In releasing the report, Mr. MacLaren noted that NAFTA had increased Canada's access to U.S. markets but that Canada remains committed to elimination of all the cited trade barriers. Looking at the two stories together,³⁹⁸ there appears to be little doubt that easing the remaining restrictions affecting Canadian trade with the U.S. would promote additional U.S. government procurement awards to Canadian producers but it also seems likely that the U.S. Congress, given the balance of trade figures, will move slowly, if at all, in acceding to the Canadian requests.

D. Changes to the FAR and U.S. law.

(1) Reserving Additional Contracts For Small Businesses. 1994's Federal Acquisition Streamlining Act³⁹⁹ (FASA) revised the Small Business Act⁴⁰⁰ to require that:

Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to

³⁹⁷ *Id.*

³⁹⁸ And recognizing that the U.S./Canada trade relationship is complicated by substantially more aspects than just these two.

³⁹⁹ Federal Acquisition Streamlining Act of 1994, Pub.L. 103-355, 108 Stat. 3243 (1994)[hereinafter FASA].

⁴⁰⁰ 15 U.S.C.A. 644(j) (West Supp. 1995).

the quality and delivery of the goods or services being purchased.⁴⁰¹

The FASA change is being implemented by FAR 19.503-3, entitled Total Small Business Set-Asides.⁴⁰² The language of the FAR clause closely follows that of the statute with the exception that the clause includes no specific provision permitting contracting officers to seek waiver of the set aside requirement.

(a) Except as provided in paragraph (b) [not applicable], each acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold in 13.106 but not over \$100,000, is automatically reserved exclusively for small business concerns and shall be set-aside.⁴⁰³

The FASA/FAR change appears to contradict the spirit of openness, if not the actual provisions, established by the FTA and NAFTA with respect to the procurement of Canadian goods. Under the government procurement sections of both agreements,⁴⁰⁴ Canadian bidders are permitted to compete for designated U.S. government procurement contracts for goods which are expected to exceed a minimum of \$25,000. The FASA/FAR change, without referring to the Agreements, effectively increases this threshold to \$100,000. In fairness, it must be noted that both of the Agreements specifically exclude coverage of those contracts which the U.S. designates as small

⁴⁰¹ FASA, *supra* note 399, s 4004.

⁴⁰² The FAR provision was developed under FAR Case 94-780, Small Business, as a regulatory enactment of a required statutory (FASA) change. As of May 8, 1995, the Unified Agenda of the DoD, GSA, and NASA reported the FAR provision in the "final rule stage." 60 Fed. Reg. 24225-01 (1995).

⁴⁰³ Proposed FAR 19.503-3(a); 60 Fed. Reg. 2302, 2308 (1995).

⁴⁰⁴ FTA, *supra* note 14, at Art. 1304; NAFTA, *supra* note 15, at Art. 1001.2c.

business set-aside contracts.⁴⁰⁵ Nonetheless, the change will likely result in fewer U.S. government contracts being available for award to Canadian producers.⁴⁰⁶

The dollar threshold change is further exacerbated by proposed FAR 19.503(c) which establishes a presumption that contracts in excess of \$100,000 will also be designated as small business set-asides when there is a reasonable expectation that

- (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns . . . ; and
- (2) awards will be made at fair market prices.⁴⁰⁷

Canada has several avenues by which it can register its displeasure with this anticipated reduction in procurement opportunities. These may include raising the issue as part of ongoing trade discussions with the U.S., registering a formal complaint under the NAFTA dispute resolution mechanism, or, somewhat unlikely, initiating retaliatory trade sanctions. As noted above, Canada's International Trade Minister recently expressed frustration with the effect of the continuing U.S. small business set-aside program on Canadian exports. Thus, it appears, for at least the time being, that Canada will attempt to resolve this somewhat minor irritation through the venue of government-to-government

⁴⁰⁵ FTA, *supra* note 14, at Annex 1304.3, United States, General Note 1; NAFTA, *supra* note 15, at Annex 1001.2b, Schedule of the United States, General Note 1.

⁴⁰⁶ It would not be a complete surprise to see a bid protest brought before the Comptroller General by a disappointed Canadian bidder attempting to enforce the FTA/NAFTA \$25,000 threshold in place of the FASA/FAR \$100,000 threshold. If brought, I would expect the Comptroller General to deny the protest: FASA is binding U.S. law which the contracting officer is required to follow, and, secondly, the Agreements contain no prohibition against a signatory party increasing the small business set-aside threshold.

⁴⁰⁷ Proposed FAR 19.503-3(c); 60 Fed. Reg. 2302, 2308 (1995).

discussions rather than in some other manner.

(2) Requirement To Consider Past Performance. In a final rule published March 31, 1995,⁴⁰⁸ federal agencies were directed to begin, by not later than July 1, 1995, considering offerors' past performance as a selection criteria on all offers to be awarded as negotiated contracts which have an estimated value in excess of \$1 million.⁴⁰⁹ The dollar value of contracts covered by the requirement decreases to \$100,000 by Jan. 1, 1999.⁴¹⁰ Under the rule, agencies will begin maintaining evaluations of past contractor performance but offerors must also be permitted to identify federal, state and local government, and private contracts they have performed which are similar to the contract being evaluated.⁴¹¹ Firms lacking relevant performance history must receive a neutral evaluation for the criterion. Importantly, past performance information may also be obtained from "other sources known to the Government."⁴¹² "Other sources" would seem to be broad enough to include the CCC. Thus, although not specifically included in the FAR guidance, contracting officers who receive offers from Canadian firms in response to RFPs subject to the performance history requirement should be strongly encouraged to routinely request the CCC to provide any known past performance information, subject to the three year limit set out in the rule.

⁴⁰⁸ FAC 90-26, FAR Case 93-02; 60 Fed. Reg. 16718-01 (1995).

⁴⁰⁹ FAR 15.605(b)(1)(ii)(A); 60 Fed. Reg. 16718, 16719 (1995).

⁴¹⁰ *Id.*

⁴¹¹ FAR 15.608(a)(2)(ii); 60 Fed. Reg. 16718, 16719 (1995).

⁴¹² *Id.*

E. Proposed changes to the FAR and U.S. law.

(1) Proposed FASA II Changes. Following closely on the heels of FASA, the proposed Federal Acquisition Improvement Act of 1995,⁴¹³ more commonly referred to as FASA II, seeks to make additional changes to the federal procurement system.⁴¹⁴ Several of the proposed changes have significance to procurements from Canada.

(a) Bid protest concerns. FASA II's section 1441 Act would restrict bidders/offerors from initiating bid protests, other than to the procuring agency, "in connection with the award or proposed award of any procurement in an amount not exceeding the simplified acquisition threshold if conducted through a system" with certified interim or full FACNET⁴¹⁵ capability. As established by FASA,⁴¹⁶ the simplified acquisition threshold is \$100,000. If enacted into law, this FASA II provision may conflict with U.S. responsibilities under the GATT/WTO Agreement on Government Procurement and NAFTA if it is applied to deny a Canadian bidder on such a contract an opportunity to bring a protest before the Comptroller General.

Under the Agreement on Government Procurement, the U.S. has agreed to

⁴¹³ A copy of the proposed Act was published as a special supplement to the Federal Contracts Report of March 27, 1995. 63 Fed. Cont. Rep. (BNA) (March 27, 1995). [hereinafter BNA FASA II copy].

⁴¹⁴ The Federal Acquisition Improvement Act of 1995 was introduced into the Congress on April 4, 1995 - into the Senate by Sen. John Glenn (D-Ohio) (S 669) and into the House by Rep. Clinger (R-Pa) (HR 1388). The bill was introduced on behalf of the administration. 63 Fed. Cont. Rep. (BNA) 469 (Apr. 10, 1995). [hereinafter FASA II].

⁴¹⁵ Federal Acquisition Computer Network.

⁴¹⁶ FASA, *supra* note 399, at s 4001.

establish a bid challenge procedure whereby challenges

shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment.

Similarly, under NAFTA, the U.S. has agreed to:

establish or designate a reviewing authority with no substantial interest in the outcome of procurements to receive bid challenges and make findings and recommendations concerning them.⁴¹⁸

Arguably, neither of these provisions are met if bid protests are restricted to protests before the procuring agency.

Because the simplified acquisition threshold and the small business set-aside threshold discussed above are both \$100,000, a conflict between the international agreements and the proposed FASA II provision would likely only occur in those instances in which a small business set-aside solicitation was opened to Canadian bidders because of a lack of U.S. small businesses. Nonetheless, to forestall possible violations of the international agreements, I suggest section 1441 of the proposed FASA II be amended by adding language making it clear the international agreements control should there be any conflict.⁴¹⁹

⁴¹⁷ Agreement on Government Procurement, *supra* note 13, At Art. XX, para. 6.

⁴¹⁸ NAFTA, *supra* note 15, at Art. 1017(g).

⁴¹⁹ Sections 4203 and 4204 of the proposed FASA II, each dealing with the requirement to synopsise notices of certain contract actions, include the following phrase which may be adapted for this purpose as well: "Subsection ... shall not apply to the extent the President determines it is inconsistent with any international agreement to which the United States is a party." FASA II, *supra* note 414.

Section 1202 of the proposed FASA II legislation would permit the Comptroller General, upon its specific finding that a protest, or a portion of a protest, is frivolous or has not been brought or pursued in good faith, to recommend that the protestor be liable to the United States for its incurred costs in reviewing and defending against the protest.⁴²⁰ Although potentially embarrassing as a foreign policy matter should such a determination be made with respect to a protest filed by the CCC, the proposed legislation does not appear to conflict with the bid protest provisions agreed to by the U.S. in either NAFTA or the Agreement on Government Procurement. While neither agreement specifically addresses the issue of frivolous/bad faith protests, the agreements contain no prohibition against assessment of the government's costs incurred in defending against such protests.

The provision at section 1204 of the proposed legislation is more troublesome.⁴²¹ Section 1204, entitled Award of Costs, would preclude any award of protest costs to a protestor unless that protestor had first submitted the protest to the agency for review.⁴²² This contrasts with current bid protest procedures which permit a protest to the agency prior to filing a protest with the Comptroller General but do not require such an agency protest.⁴²³ Paragraph 1 of Article XX of the Agreement on Government Procurement permits a signatory Party to "encourage the supplier to seek resolution of its complaint in

⁴²⁰ FASA II, *supra* note 414.

⁴²¹ *Id.*

⁴²² Agency review would be accomplished by a "senior agency official," *Id.*

⁴²³ 4 C.F.R. 21.2(a)(3) (1995).

consultation with the procuring entity."⁴²⁴ The subsequent paragraphs of Article XX, however, then outline a protest procedure before an "impartial and independent review body with no interest in the outcome of the procurement." Should the CCC, or another Canadian bidder, choose to bring its protest directly to the Comptroller General,⁴²⁵ it is certainly arguable that Article XX of the Agreement on Government Procurement could be interpreted by a WTO Dispute Settlement Body⁴²⁶ as precluding the imposition of any penalty for failure to first seek an agency-level review. As with section 1441 above, I suggest this potential conflict may be resolved by including a provision in the proposed legislation making it clear that the obligations the United States has undertaken as result of entering international agreements shall prevail in case of conflicts.⁴²⁷

(b) Direct Contracting With CCC Subcontractors. Section 7001 of the proposed legislation⁴²⁸ would permit contracting officers to contract directly with firms participating

⁴²⁴ Agreement on Government Procurement, *supra* note 13, at Art. XX, Challenge Procedures.

⁴²⁵ Among other reasons, such a decision might be made out of concerns about the possible partiality of an agency review, a history of unfavorable decisions from agency-level protests, or a desire to conserve financial resources if an appeal from an agency decision is considered inevitable.

⁴²⁶ Art. XXII of the Agreement on Government Procurement provides for the establishment of a Dispute Settlement Body upon request of any Party which considers that any benefit accruing to it under the Agreement on Government Procurement is being impeded as result of the failure of another Party to carry out its obligations under the Agreement. Agreement on Government Procurement, *supra* note 13.

⁴²⁷ See footnote 419.

⁴²⁸ FASA II, *supra* note 414, at s 7001.

in programs established under section 8(a) of the Small Business Act.⁴²⁹ Currently such contracts are awarded to the Small Business Administration which, in turn, subcontracts performance to a firm participating in the 8(a) program. Much of the day-to-day contract administration is handled directly between the contracting officer and the 8(a) subcontractor, although the Small Business Administration becomes actively involved in extraordinary contract actions. The proposal for direct contracting stems from a perception among both contracting officers and eligible small business firms that direct contracting will facilitate more efficient contract administration.⁴³⁰

Currently, under the LOA, contracts with Canadian firms are handled in much the same way as are 8(a) contracts - both interpose an intermediary party between the contracting officer and the subcontractor actually performing the work required by the contract. Should the proposal regarding 8(a) contractors become law, it may also provide an impetus and model for amending the LOA to permit direct contracting with Canadian subcontractors. While such a change in the LOA might well reduce some administrative burden on the part of contracting officers, it can also be asserted that the added value of having the CCC interposed in the "middle" of the contract substantially outweighs any such burden. Currently, as result of being a somewhat-disinterested party while also

⁴²⁹ 15 U.S.C.A. 637(a) (West Supp. 1995).

⁴³⁰ Drafters of the proposal commented that the current contracting structure is "overly complex, redundant, and unnecessary" and that "The 8(a) Program process could be significantly streamlined and simplified by amending the Small Business Act to authorize SBA to permit contracting activities to award 8(a) contracts directly to small and disadvantaged business firms...." BNA FASA II copy, *supra* note 413, drafter's analysis of section 7001, supplement page 104.

serving as a governmental body exercising considerable influence within the Canadian economy, the CCC can offer support in implementing reasonable, contractually-sound decisions of the contracting officer. Regardless of any future success in direct contracting with 8(a) firms, contracting officers should carefully evaluate the alternatives before advocating the removal of the CCC as a contracting party.

(2) Proposed Change in Competition Standard. On May 18, 1995, Representative William Clinger (R-Pa) and Floyd Spence (R-SC) introduced an alternative acquisition reform bill into the House of Representatives as HR 1670.⁴³¹ Possibly the most controversial provision of the bill would replace the current "full and open competition" standard mandated by the Competition in Contracting Act of 1984 with a "maximum practicable" competition standard.⁴³² Under the legislation, maximum practicable competition would be considered to be achieved when a maximum number of responsible or verified sources (consistent with the particular government requirement) are permitted to submit offers on the procurement.⁴³³ The bill would also simplify the standards to be considered when using "other than competitive procedures."⁴³⁴ Further, for purchases under the simplified acquisition threshold, the standard for obtaining competition would be

⁴³¹ *Acquisition reform: Clinger, Spence Offer Bill To Replace CICA Full And Open Competition Standard With "Maximum Practicable" Standard*, 63 Fed. Cont. Rep. (BNA) 20 d3 (May 22, 1995). [hereinafter *Clinger, Spence Offer Bill*].

⁴³² *Clinger, Spence Offer Bill*, *supra* note 431.

⁴³³ *Id.*

⁴³⁴ *Id.*

"to the extent practicable consistent with the particular Government requirement."⁴³⁵

Per its sponsors, the bill is intended to streamline government procurements by avoiding the need for government evaluators to consider bids/offers from companies which are not qualified to perform the intended contract.⁴³⁶ A summary of the bill reportedly includes the explanation that "the government 'can no longer afford competition for the sake of competition.'"⁴³⁷ Although details are yet to be finalized, the bill contemplates a pre-qualification system under which, at least with respect to awards to meet the government's "repetitive needs," vendors would compete for a place on a "verified vendors list" of those eligible to compete for award.⁴³⁸

Reaction to the suggested change in competition standards has been mixed. Office of Federal Procurement Policy Administrator Steven Kelman stated that the administration is "intrigued" by the approach but stopped short of endorsing the proposed standard.⁴³⁹ Administrator Kelman did emphasize that the administration would not support any approach that would close the door to initial access to the federal market.⁴⁴⁰ A

⁴³⁵ *Id.*

⁴³⁶ *Acquisition Reform: HR 1670's Proposal To Abandon Full And Open Competition Gets Lukewarm Reception; Administration Opposes Bid Protest Provisions*, 63 Fed. Cont. Rep. (BNA) 21 d3 (May 29, 1995). [hereinafter *Proposal Gets Lukewarm Reception*]

⁴³⁷ *Clinger; Spence Offer Bill*, *supra* note 431.

⁴³⁸ *Proposal Gets Lukewarm Reception*, *supra* note 436.

⁴³⁹ *Id.*

⁴⁴⁰ *Competition: OFPP Seeking Compromise To Collins Competition Provision*, 6/27/95 Fed. Cont. Daily (BNA) d3 (June 27, 1995).

representative of the DoD stated that it supported the concept that "full and open competition 'isn't the only effective way'" but also declined to endorse the proposed standard without further study.⁴⁴¹ Defense industry reaction has also been mixed. Some industry associations, such as the Computer and Communications Industry Association, have come out against any change, in part because of fears that the new standard would engender additional litigation over its meaning.⁴⁴² Other industry representatives, including those from the Information Technology Association of America, have endorsed the approach while expressing concern about the specifics of any implementing regulations.⁴⁴³

If implemented, such a system would likely be considered as a "selective tendering procedure" under the Agreement on Government Procurement.⁴⁴⁴ Under the Agreement on Government Procurement, such a change in the competition standard is permitted so long as tenders are invited "from the maximum number of domestic suppliers and suppliers of other Parties, consistent with the efficient operation of the procurement system" and suppliers offered an opportunity to submit tenders are selected in a "fair and non-discriminatory manner."⁴⁴⁵ Where prior qualification is the basis for selection as a

⁴⁴¹ *Proposal Gets Lukewarm Reception*, *supra* note 436.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ Agreement on Government Procurement, *supra* note 13, Art. VII, paragraph 3(b). "Selective tendering procedures are those procedures under which . . . those suppliers invited to do so by the entity may submit a tender."

⁴⁴⁵ *Id.*, Art. X, paragraph 1.

potential offeror, entities are prohibited from discriminating between suppliers of other Parties or between domestic suppliers and suppliers of other Parties while in the process of qualifying suppliers.⁴⁴⁶

If implemented in a non-discriminatory fashion and in accordance with the selective tendering guidelines set out in the Agreement on Government Procurement, I don't believe such a modified competition standard would violate the Agreement on Government Procurement. Although the Agreement on Government Procurement has strict guidelines on the use of limited tendering, i.e., sole source or other award methods substantially curtailing competition, it does not express a preference between open tendering, i.e., full and open competition, and selective tendering, i.e., a curtailed level of competition based on pre-qualification, so long as a standard of "maximum possible competition" is met.⁴⁴⁷ As noted above, the level of sufficient competition under selective tendering may properly consider the efficient operation of the procurement system.

(3) Proposed Change To The BAA. As discussed above,⁴⁴⁸ commentators have expressed concern that the interaction between the rule of origin applied under the Buy American Act and the rule of origin applied under the Trade Agreements Act, in implementation of the Government Procurement Code, serves to discourage the manufacture of goods in the U.S. On Feb. 8, 1995 the American Bar Association Section of Public Contract Law forwarded a letter to OFPP Administrator Mr Steven Kelman

⁴⁴⁶ *Id.*, Art. VIII.

⁴⁴⁷ *Id.*, Art. XV.

⁴⁴⁸ See pages 36-38.

advocating that the rule of origin currently used when the BAA is applicable be made consistent with the "substantial transformation" test used when the TAA applies.⁴⁴⁹ The ABA suggested that the actions necessary to implement the change could be made as regulatory, rather than statutory, changes under the "public interest" exception included within the BAA.⁴⁵⁰

If adopted, such a change might well encourage U.S. firms to utilize a greater percentage of Canadian (or other non-U.S.)-produced or manufactured components than now permitted under the BAA rules of origin so long as the component goods are "substantially transformed" in the U.S. The OFPP has made no reported response to the suggestion.

⁴⁴⁹ *ABA Recommends Buy American Rule Adopt Substantial Transformation Test*, 12 Int'l Trade Rep. (BNA) 297 (Feb. 15, 1995).

⁴⁵⁰ *Id.* at 298.

Chapter VIII. Conclusion

Although government procurement from Canadian sources is similar in many ways to procurement from U.S. sources, the effective contracting officer, and his or her supporting government counsel, must be aware that it is not identical. Not only do specialized FAR provisions and procedures apply in many instances, but they are based on international agreements and U.S. statutes which vary in their applicability depending on the specifics of the transaction. This concluding chapter will provide a summary, drawn from the previous chapters, as to which agreements and provisions apply in which procurements.

NAFTA covers the largest percentage of contracts from Canadian sources.⁴⁵¹ With respect to U.S. Government procurements from Canadian sources, NAFTA covers supply contracts for \$25,000 or more, service contracts for \$50,000 or more, and contracts for construction services of \$6.5 million or more.⁴⁵² NAFTA's Chapter 10 covers government procurement and establishes the minimum openness and transparency requirements procedurally required by the agreement. FAR provisions have been promulgated which implement NAFTA's requirements. Importantly, under NAFTA, as under its predecessor U.S.-Canada Free Trade Agreement, disappointed Canadian bidders have the right to bring protests before the Comptroller General.

⁴⁵¹ See text beginning at page 42.

⁴⁵² Always check to make certain that the U.S. Agency making the purchase is included within the list of agencies covered by NAFTA. Most, but not all, executive branch agencies are covered and, similarly, many, but not all purchases of specific goods or services are included.

While NAFTA is a trilateral agreement, both Canada and the U.S. are also signatories to the plurilateral GATT Government Procurement Code, which became effective on January 1, 1981 and continues effective today.⁴⁵³ The Government Procurement Code covers a smaller percentage of procurements from Canadian sources than does NAFTA - it does not cover any services and its coverage of supply contracts begins at a contract value of \$176,000. The Government Procurement Code established minimum procedural standards for contract award which were important when first agreed to but which have all also been incorporated into NAFTA.

On January 1, 1996, the Government Procurement Code is scheduled to be replaced by the GATT Uruguay Round's Agreement on Government Procurement, another plurilateral international agreement to which both Canada and the U.S. are parties.⁴⁵⁴ In large part, the Agreement on Government Procurement mirrors the procedural provisions contained in NAFTA, although its contract value coverage does not meet that of NAFTA. Between Canada and the U.S., the Agreement on Government Procurement covers both supply and service contracts of at least \$176,000 and contracts for construction services of at least \$6.5 million. Although negotiations leading to the Agreement on Government Procurement placed much emphasis on including procurements from sub-central jurisdictions (states/provinces), the agreement, as between Canada and the U.S., does not currently cover any sub-central procurements. As with the NAFTA agreement, it is very important to closely check the agreement's annexes to

⁴⁵³ See text beginning at page 33.

⁴⁵⁴ See text beginning at page 50.

determine which agencies and types of goods/services are covered.

Together, NAFTA and the Agreement on Government Procurement are the two most important international agreements between Canada and the U.S. with respect to government procurement. A contracting professional interested in procurements from Canadian sources will find it worthwhile to study each agreement's government procurement provisions.

Although having been in existence for many years, the Letter of Agreement (LOA) between the Canadian government and the U.S. Defense Department establishes basic procedures for the greatest single group of contracts from Canadian sources.⁴⁵⁵ As will be recalled, under most circumstances, the LOA requires the DoD's contracting officer to enter a contract relationship with the Canadian Commercial Corporation, which then subcontracts performance to a Canadian firm. A host of detailed FAR provisions and corresponding case law has developed to implement the LOA and from all appearances, the LOA procedures continue to work well. Neither NAFTA nor the Agreement on Government Procurement contain provisions which place the continued viability of the LOA's terms in jeopardy.

In many ways, the applicability of the Buy American Act (BAA) may be one of the most difficult problems in considering a potential procurement from a Canadian source.⁴⁵⁶ Although several BAA issues were considered earlier in this thesis, and, the applicability of the BAA was considered under different international agreements, in summary, the

⁴⁵⁵ See text beginning at page 55.

⁴⁵⁶ See text beginning at page 27.

BAA applies to very few procurements from Canadian sources. To start with, the BAA only applies to contracts for supplies - if the contract from a Canadian source is for services, the BAA does not apply (although it may still apply to supplies provided under a construction services contract). With respect to supplies, FASA exempts contracts for the purchase of supplies totalling \$2,500.00 or less from the BAA and NAFTA exempts Canadian end products under supply contracts with an estimated value above \$25,000 from the BAA. The FAR provision defining Canadian end products adopts the substantial transformation rule of origin under which goods not originally grown, produced, or manufactured in Canada may become Canadian end products if transformed in Canada into "a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed."⁴⁵⁷ NAFTA also exempts construction supplies provided under contracts for construction services covered by NAFTA (generally construction contracts of \$6.5 million or more) but does not exempt construction supplies provided under lower dollar value construction contracts. Recall however, under the case law examined in thesis chapter 5 (at page 100), that a Canadian construction good may still avoid the BAA if it is integrated as a component of a multiple-part material prior to being brought to the construction site and the U.S. content of the integrated material is greater than 50 percent of the total.

Finally, the procedures underlying U.S. government procurements from Canadian sources are subject to change, sometimes intended but sometimes also unintended, as international agreements continue to mature, Canadian/U.S. political realities change, and

⁴⁵⁷ FAR 25.401; 48 C.F.R. 25.401 (1994).

as applicable U.S. statutes and procurement regulations are amended.⁴⁵⁸ Again, an understanding of the international agreements in their current form will provide a good basis for considering the potential effect which changes to the domestic procurement system may bring to procurements from Canadian sources.

⁴⁵⁸ See text beginning at page 118.

Appendix - Glimpses Of The Canadian Procurement System

The central government of Canada annually awards contracts totalling approximately \$27 billion (Canadian dollars).⁴⁵⁹ Some of those contracts are awarded to U.S. firms, including, as example, a \$1.3 million (U.S. dollars) contract for development of a "High Arctic Data Communications System Phase II Radio Receiver/Transmitter" awarded in August, 1994 to Alliant Techsystem Signal Analysis Center, located in Annapolis, Md.⁴⁶⁰ The Department of Commerce reports that 19 contracts, resulting from solicitations covered by NAFTA or the Government Procurement Code, were awarded to U.S. firms by Canada's central government in the first quarter of 1994 for a total award value in excess of \$995,000.⁴⁶¹ Other contracts are awarded to Canadian-based subsidiaries of U.S. companies. For example, General Motors of Canada, Pratt & Whitney Canada, and Lockheed Canada Inc. were each among the top 10 suppliers to the Canadian government during the fiscal year ending March 31, 1994.⁴⁶²

Per the Department of Commerce's Foreign Commercial Service, Canadian

⁴⁵⁹ \$8.1 billion of annual contracts awarded by the supply program of Public Works and Government Services Canada is about 30 percent of the goods and services bought by the government of Canada. Alan Toulin, *GM's \$540M Tops Federal Contractors*, THE FIN. POST, July, 2, 1994, at Sec.1, pg. 1.

⁴⁶⁰ *USA: Signal Analysis Center Awarded Contract For Canadian Service Communications*, Pr. Newswire, Aug. 1, 1994, available in WESTLAW, Int-news database.

⁴⁶¹ *Canada- Government Procurement Summary*, 1995 National Trade Data Bank Market Reports, March 21, 1995 (derived from a telegraphic report dated 3 October 1994 prepared at the American Embassy - Ottawa), available in LEXIS, Canada library, Mktrpt file.

⁴⁶² Toulin, *supra* note 459.

government purchase sectors offering the best prospects for sales of U.S. products are airport and ground support equipment and computer and information services.⁴⁶³ Sales of U.S. computer and information processing technology are expected to be particularly bright. As the Canadian federal government seeks to reduce overall expenditures over the next several years in response to its budget deficit, it is expected to make additional purchases of computer and information processing technology to permit it to meet an increased demand for services at a lower overall cost.⁴⁶⁴ The Department of Commerce reports that it has generally found competition on Canadian central government procurements to be fair, although it does recognize that Canadian products offering similar features at a similar cost to those offered by U.S. suppliers are often favored, particularly on procurements not covered by NAFTA or the Government Procurement Code.⁴⁶⁵

A. Federal Government Procurement.⁴⁶⁶ Most procurements on behalf of the federal government are accomplished by the Department of Government Services

⁴⁶³ *Canada - Government Procurement Summary*, *supra* note 461.

⁴⁶⁴ *Canada - Government Information Technology Purchases*, 1994 National Trade Data Bank Market Reports, March 17, 1994 (derived from a telegraphic report dated 2 March 1994 prepared at the American Consulate - Toronto), *available in* LEXIS, Canada library, Mktrpt file.

⁴⁶⁵ *Canada - Government Procurement Summary*, *supra*, note 461.

⁴⁶⁶ See Paul E. Pompeo, *East Meets West: A Comparison Of Government Contract Dispute resolutions In The Common Law And Islamic Systems* (1991) (LL.M. thesis, George Washington University, published in a revised form at 14 L.A. INT'L & COMP. L. J. 4 (1992)) for additional information regarding the Canadian procurement system with a special emphasis on dispute resolution.

(formerly known as the Department of Supply and Services Canada⁴⁶⁷), acting in its role as the central purchasing agent for all federal departments and agencies, and by Public Works Canada, which acts as the central purchasing agency for construction contracts for most federal entities.⁴⁶⁸ Construction contracting for the Department of National Defence is handled by Defence Construction Limited.⁴⁶⁹

All proposed procurements subject to the Government Procurement Code or NAFTA are published in Canada's "Government Business Opportunities (GBO),"⁴⁷⁰ similar to the U.S. Commerce Business Daily. The GBO is published daily and contains information on government tenders and contract awards.⁴⁷¹ Subscriptions to the GBO are available through the Canadian government. Bid packages for non-restricted solicitations reported in the GBO are available only through the "Open Bidding Service" (OBS), administered by the Department of Government Services.⁴⁷² Potential bidders may

⁴⁶⁷ *Canada - On-Line Bidding On Govt Tenders*, 1993 National Trade Data Bank Market Reports, Nov. 16, 1993 (derived from a telegraphic report dated 22 Oct. 1993 prepared at the American Embassy - Ottawa) *available in* LEXIS, Canada library, Mktrpt file.

⁴⁶⁸ *Canada - Business Guide*, 1993 National Trade Data Bank Market Reports, June 16, 1993 (derived from a report dated April 1993 prepared at the U.S. Dept. of Commerce, Wash. D.C.), *available in* LEXIS, Canada library, Mktrpt file.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

subscribe to the OBS on-line service,⁴⁷³ and request bid documents electronically, or they may subscribe to the standard OBS bid request line service and request bid documents by phone or fax.⁴⁷⁴ The OBS on-line system may also be used to submit bids electronically.⁴⁷⁵ The U.S. Department of Commerce additionally synopsis notices of selected solicitations subject to NAFTA and the Government Procurement Code in its Trade Opportunities Program (TOP).⁴⁷⁶ TOP leads are distributed electronically via the Department of Commerce Electronic Bulletin Board and are also available through Department of Commerce regional offices.⁴⁷⁷

The Department of Commerce characterizes the following tips to U.S. bidders as "essential factors" in the bidding process.⁴⁷⁸

Time is critical. Bids are generally open for 40 calendar days after the publication date. The open date may be shorter in cases of emergency.

⁴⁷³ At the time the service was initiated, one-time registration costs, required for access to the service, varied from \$137.00 to \$230.00 (Canadian dollars). *Canada - On-Line Bidding On Govt Tenders*, *supra* note 467.

⁴⁷⁴ *Canada - Business Guide*, *supra* note 468.

⁴⁷⁵ *Canada - On-Line Bidding On Govt Tenders*, *supra* note 467.

⁴⁷⁶ *Canada - Business Guide*, *supra* note 468.

⁴⁷⁷ *Id.* Examples of recent TOP announcements include a solicitation for the supply of sodium chloride to the Canadian Forces Base at Shilo, Manitoba, Foreign Trade Opportunity announcement dated May 22, 1995; a solicitation for the supply of lumber and door frames to the Canadian Forces Base at Borden, Ontario, Foreign Trade Opportunity Announcement dated May, 9, 1995; and, a solicitation for the supply of aluminum bronze strip for the Royal Canadian Mint's facility at Winnipeg, Manitoba, Foreign Trade Opportunity dated May 9, 1995. *Available in* LEXIS, Canada library, FTO file.

⁴⁷⁸ *Canada - Business Guide*, *supra* note 468.

Make use of the fax number included in the notice to request bid packages [or, request the bid package electronically]. Bid package requests by mail can result in delays of up to two weeks for publication and mailing.

Bidders must be responsive to the product requirements specified in the bid package. General bids for any procurements of specified products, or simply sending general product literature, will not be successful.

Price and technical specifications are key considerations. The Canadian government is seeking to reduce a large federal budget deficit. Hence, price matters.

Bid submissions are considered final. On occasion, an opportunity is provided to negotiate a lower, competitive (best and final) offer.

U.S. bidders have expressed some frustration with so-called non-tariff barriers to trade with Canada. Chief among these barriers has been the Canadian Regional and Industrial Benefits (IRB) program.⁴⁷⁹ The program, applicable to contracts in support of federal Crown Projects, requires that bidders include commitments to utilize Canadian sub-component or component manufacturers. The program also seeks to generate industrial growth in less developed regions of Canada by giving award preference to bidders offering to establish and develop suppliers in areas such as Western or Atlantic Canada.⁴⁸⁰ TRW's May 1993 contract actions, acting in its capacity as a subcontractor on

⁴⁷⁹ *Canada - Defense Electronics*, 1995 National Trade Data Bank Market Reports, March 21, 1995 (drawn from an article titled "The Defense Electronics Market in Canada," dated September 1993, and prepared by Mr. Ian Falconer, American Embassy - Ottawa) available in LEXIS, Canada library, Mktprt file.

⁴⁸⁰ Arguably, the provision in NAFTA (and the similar provision in the GATT/WTO Agreement on Government Procurement) forbidding the inclusion of "offsets" prohibits including Canada's IRB program in a solicitation covered by the agreement. The NAFTA offset provision states:

Each party shall ensure that its entities do not, in the qualification and selection of suppliers, goods or services, in the evaluation of bids or the award of contracts, consider, seek, or impose offsets. For purposes of this

a contract with the Canadian Department of National Defence, demonstrates the IRB program.⁴⁸¹ The subcontract awarded to TRW, a Cleveland-based firm, included a flow-down IRB program clause.⁴⁸² TRW implemented the clause by awarding a \$10 million (Canadian dollar) second tier subcontract to SED Systems, Inc., of Saskatoon, Saskatchewan.⁴⁸³ Upon announcing the award to SED, TRW noted that it was "evidence of TRW's commitment to provide opportunities for business in western Canada."⁴⁸⁴

In the last several years, Canada has experimented with a shortened procurement process referred to as "Common Purpose Procurement" under which major information technology (IT) procurements, from the drafting of the initial requirement through the contract award, are completed in less than 40 days.⁴⁸⁵ The procurement system begins with the drafting and distribution to vendors of a 15-page business requirement statement

Article, offsets mean conditions imposed or considered by an entity prior to or in the course of its procurement process that encourages local development or improve its Party's balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements.

NAFTA, *supra* note 15, Art. 1006.

⁴⁸¹ *Canada: TRW Awards \$10 Million Contract To Canada's SED Systems, Inc.*, Reuter Textline, May 21, 1993, available in LEXIS, Canada library, Curnws file.

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ J.P. Richard, *Fast Canadian Procurement Holds Lessons For Us; The Beltway and Beyond Column*, GOVERNMENT COMPUTER NEWS, Aug. 30, 1993, at 27. Unless otherwise noted, all the information in this paragraph was drawn from Mr. Richard's cited article.

which describes the general requirements of the good being purchased as well as the evaluation criteria. Potential vendors respond in writing with their qualifications - including information such as references, track record, resumes of key participants, risk management methodology, and any other data believed relevant by a vendor. After agency evaluation, a shortened list of qualified vendors is selected as potential awardees. These potential awardees verbally present their credentials and recommendations to a panel of agency and Department of Government Services evaluators after having been provided the opportunity to interview agency employees concerning any questions regarding agency requirements. Contract price may be discussed at this vendor presentation before the panel - the first time price has been discussed up until this point. The panel selects a vendor which then begins performance while final contract negotiations continue. Typically, contracts awarded in this fashion have included four separate performance stages: definition, development, implementation, and operation. It is believed that selected vendors will be willing to accept the risks associated with the earlier performance stages in exchange for an opportunity to perform the later implementation and operation stages. Interestingly, once awarded, a contract will continue until *either* party invokes a termination clause. It is reported that the Canadian government has used this approach in at least 10 projects, with another 10 identified as possible candidates for the process. Experience to date indicates the process as being more applicable to systems and design integration projects, and other similar projects where a solution is not immediately obvious, than to off-the-shelf hardware or software buys. Published reports indicate that at least one of the proposed legislative changes to

the U.S. procurement system will likely include a requirement for a test of quickened IT procurement awards based on this Canadian model.⁴⁸⁶ Although praised by industry because it results in prompt awards, it would appear that the expedited system, in its present form, may well conflict with the government procurement provisions of NAFTA and the Agreement on Government Procurement - both of which generally require a minimum of 40 days from the date solicitations are released until the bid/offer due date.⁴⁸⁷

In addition to looking to award contracts faster, Canada is also actively exploring incorporating more commercially-available technology as part of its purchases. Speaking in late 1994, Canadian Minister of Defence Mr. David Collenette suggested that some current Canadian Armed Forces storage depots might be replaced with "just-in-time" distribution systems which place a higher demand on civilian parts providers.⁴⁸⁸ He also suggested a continuing move, where possible, towards procurement of more off-the-shelf goods in place of specially designed goods.⁴⁸⁹

B. Sub-Central Government Procurements. As noted above, currently neither NAFTA nor the Agreement on Government Procurement cover procurements by Canada's

⁴⁸⁶ "It is almost a foregone conclusion that the legislation will include some type of pilot acquisition project-the Canadian Model or something similar." *Cohen, Clinger Developing New Approaches For Bid Protests, Contracts Disputes*, 63 Fed. Cont. Rep. (BNA) 548 (May 1, 1995).

⁴⁸⁷ NAFTA, *supra* note 15, Art. 1012, para. 2(a); Agreement on Government Procurement, *supra* note 13, Art. XI, para. 2(a).

⁴⁸⁸ Neville Nankivell, *Canada: A Brave New World For Canada's Defence Industry*, FIN. POST, Nov. 5, 1994, at S2.

⁴⁸⁹ *Id.*

sub-central governments from U.S. sources. These entities are estimated to award as much as \$50 billion (Canadian dollars) of contracts each year.⁴⁹⁰

Somewhat similarly to U.S. states, although to a larger degree, Canadian provinces have traditionally pervasively incorporated buy-local requirements into their contracts. While these have encouraged the growth of industry in each province, they have also meant that bidders located in one province (or a bidder from the U.S.) were often not eligible to bid on solicitations issued by another province. Recognizing these policies to be economically wasteful,⁴⁹¹ trade ministers from each of the provinces entered an agreement in 1994 to reduce, although not totally eliminate, the trade barriers.⁴⁹² Under the agreement, buy-local restrictions will still be permitted if they fit into one of seven categories - including public security and order, environmental protection, and worker safety.⁴⁹³

⁴⁹⁰ *Barriers Start To Come Down*, FIN. POST, May 13, 1994, at 10.

⁴⁹¹ These restrictions have been estimated to add up to \$7 billion (Canadian dollars) annually to the cost of provincial purchases., *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*